Supreme Court, U. S.
FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPEAL DOCKETED JULY 27, 1973
PROBABLE JURISDICTION NOTED OCTOBER 15, 1973

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Omissions from Appendix

The following items are omitted from this Appendix because they are printed in the jurisdictional statement as follows:

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Opinion of the Court of Appeals for the Second Circuit on the merits	J.S. 1a
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Opinion of the District Court for the Eastern District of New York	J.S. 51a
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Notice of Appeal to the Supreme Court of the United States	J.S. 86a

Docket Entries

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DATE	FILINGS—PROCEEDINGS
8-2-72	Complaint filed. Summons issued.
8-2-72	Order permitting personal service of summons and complaint filed.
8-3-72	Order to show cause and memorandum filed, for a preliminary injunction etc. (ret Aug 1, 1972)
8-3-72	Supplement to pltffs' memorandum filed in support of issuance of temporary restraining order.
8-4-72	Summons returned and filed with aff'd of srv. executed.
8-10-72	Undertaking on injunction ($250.00) filed.
8-16-72	Letter dtd. 8/12/72 to J. Dooling from Evelyn Boyce filed.
8-16-72	Letter dtd. 8/12/72 to Evelyn Boyce from J. Dooling, filed.
8-18-72	Answer filed with annexed affidavits of James J. Oiste and Harriet Coorssen.
8-18-72	Memorandum in opposition to issuance of preliminary injunction filed, by defts.
8-31-72	Before Dooling, J.—Case called—Hearing held & concluded—t.r.o. cont'd.

Docket Entries

DATE	FILINGS—PROCEEDINGS
9-8-72	Copy of pltffs' memorandum filed, in support of issuance of a preliminary injunction.
9-11-72	By Dooling, J.—Order dtd 9/8/72 continuing t.r.o. filed.
9-21-72	By Dooling, J.—Memorandum & Order incorporating findings of fact dtd 9-20-72 filed. It is ordered that the motion for a preliminary injunction is denied; the temporary restraining order is continued for five days after the entry of the present order to enable pltffs to apply to the Court of Appeals for an injunction pending appeal under Rule 8(a) (P/C mailed to attys).
9-26-72	—Pltff's memo of law filed.
9-26-72	Notice of Appeal Filed. Copy of appeal mailed to C/A and to Von Oiste and Cartes, Esqs. Port Jefferson, N.Y. 11777.
10-12-72	Record on appeal certified and given to Susan Herman for delivery to Court of Appeals. Receipt in file.
3-26-73	Before Dooling, J.—Case called for conf.—Held & concluded.
3-28-73	By Dooling, J.—Order to show cause ret 3-29-73 without proof of service dtd 3-27-73 filed.

Docket Entries

DATE	FILINGS—PROCEEDINGS
3-29-73	Before Dooling, J.—Case called. Permanent injunction, declaratory judgment granted.
4-13-73	Notice of appeal filed. Duplicate mailed to C of A.
5-18-73	Certified copy of judgment & copy of opinion received from C of A reversing order of this court & filed. jn.
5-24-73	Certified copy of judgment received from C of A affirming injunction entered 3-29-73 filed.

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 73-1607

BRUCE BORAAS, et al.

v.

VILLAGE OF BELLE TERRE, et al.

DATE	FILINGS—PROCEEDINGS
4-13-73	Filed motion for a preference and for leave to dispense with filing a brief & appendix, etc. with proof of service.
4-16-73	Filed cross-motion for summary affirmance or alternatively that this appeal be referred to the panel which heard the initial appeal with p/s.
4-18-73	Filed copies of docket entries and notice of appeal.
4-19-73	Filed order referring motion for a preference and for leave to dispense with filing a brief & joint appendix to panel hearing appellees' summary affirmance motion on 5-1-73.
4-25-73	Received docket fee
5-1-73	Filed order granting motion for summary affirmance (O.A.)
5-17-73	Filed notice of appeal to the Supreme Court (Village of Belle Terre and individual defendants) p/s
5-18-73	Issued certified copy notice of appeal to the Supreme Court.

Docket Entries

DATE	FILINGS—PROCEEDINGS
5-23-73	Issued certified copy of order of 5-1-73 for summary affirmance.
6-1-73	Filed receipt by Supreme Court of notice of appeal.
8-1-73	Filed notice of filing of petition for writ of certiorari (S.C. #73-191).
10-24-73	Filed certified copy of order of Supreme Court—statement of jurisdiction having been submitted and considered by the court, probable jurisdiction is noted.

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants.

BRUCE J. ENNIS
LAWRENCE G. SAGER
ARTHUR N. EISENBERG
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

I. JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28 United States Code, Sections 1331(a), 1343 and 2201, *et seq.*, this suit being authorized by Title 42 United States Code, Section 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent further deprivation under color of state law, statute, or ordinance, of rights, privileges and immunities secured to plaintiffs by the Constitution and Statutes of the United States, including the right to equal protection and due process of law under the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Section 1983.

II. PARTIES PLAINTIFF

2. BRUCE BORAAS is 24 years old. He is entering his third year of graduate study at the State University of New York at Stony Brook. He is working towards a doctorate in sociology, and holds a research assistantship at the University. As more fully set out below, he resides with five other Stony Brook students in a single family residence within the incorporated Village of Belle Terre, New York, and commutes from that residence to the University.

3. ANNE PARISH is 23 years old. She is enrolled as a third year undergraduate student at the State University of New York at Stony Brook, for the academic year which commences in September of 1972. As more fully set out below, she resides with five other Stony Brook students in a single family residence within the incorporated Village

of Belle Terre, New York, and intends to commute from that residence to the University.

4. MICHAEL TRUMAN is 25 years old. He is entering his fourth year of graduate study at the State University of New York at Stony Brook. He is working toward a doctorate in sociology, and holds a teaching assistantship at the University. As more fully set out below, he resides with five other Stony Brook students in a single family residence within the incorporated Village of Belle Terre, New York, and commutes from that residence to the University.

5. EDWIN DICKMAN and JUDITH DICKMAN are husband and wife. As more fully set out below, they are the owners and lessors of a single family residence within the incorporated Village of Belle Terre, New York, which premises [hereafter referred to as the Dickman house] are presently occupied by six individuals who are unrelated by blood, adoption, or marriage.

III. PARTIES DEFENDANT

6. The VILLAGE OF BELLE TERRE is a municipality, duly incorporated under the laws of the State of New York, and situated in the County of Suffolk. As more fully set out below, the Building Zone Ordinance of the Village of Belle Terre proscribes the occupancy of any residence within the Village by more than two persons not related by blood, adoption or marriage.

7. JAMES PHILBIN is Mayor of the Village of Belle Terre. He is sued here in said official capacity.

8. ROBERT DOERR is Deputy Mayor and Trustee of the Village of Belle Terre. He is sued here in said official capacity.

9. VINCENT BOVE is Trustee of the Village of Belle Terre. He is sued here in said official capacity.

10. VINCENT KARWOWSKI is Trustee of the Village of Belle Terre. He is sued here in said official capacity.

11. FRANCIS STOLZ is Trustee of the Village of Belle Terre. He is sued here in said official capacity.

IV. INCIDENTS AT ISSUE

12. On or about December 1, 1971, plaintiff Michael Truman signed a written lease concerning a detached, residential house located at the intersection of Harbor View Road and Cliff Road, in the incorporated Village of Belle Terre, Suffolk County, New York, referred to herein as the Dickman house. Those premises were at that time and still are owned by Edwin and Judith Dickman, husband and wife. The lease, signed by Michael Truman as lessee and the Dickmans as lessors, let the premises for a term of 18 months, commencing on December 1, 1971, and terminating on May 31, 1973. The stipulated rent was $500.00 per month, and a security deposit of $1,000.00 was required.

13. Since the execution of the lease referred to in paragraph 12 of this complaint, Michael Truman has resided in the Dickman house. It is his intention and desire to remain in the Dickman house until the termination of the lease in May of 1973, during which period he will continue

his graduate studies at the State University of New York at Stony Brook.

14. On or about June 1, 1972, plaintiff Bruce Boraas signed a copy of the lease to the Dickman house, identical in all respects to that executed by Michael Truman, as per paragraph 12 of this complaint, except for the addition of Boraas as a lessee. At that time Boraas assumed residence in the Dickman house and has since continued to reside there. It is his intention and desire to remain in the Dickman house until the termination of the lease in May of 1973, during which period he will continue his graduate studies at the State University of New York at Stony Brook.

15. On or about June 1, 1972, plaintiff Anne Parish assumed residence in the Dickman house. She did not sign a lease. However, Mr. and Mrs. Dickman, the lessors, are aware that she presently resides in the Dickman house and accepted a check for the $500.00 rent for the Month of July, 1972, which bore her name and signature. It is her intention and desire to remain in the Dickman house until the termination of the lease in May of 1973, during which period she will pursue studies as an undergraduate student at the State University of New York at Stony Brook.

16. In addition to plaintiffs Boraas, Parish, and Truman, three other Stony Brook students are presently resident in the Dickman house. Franklin Beckman is a graduate student in sociology in the fifth year of a doctorate program who holds a teaching assistantship at Stony Brook. It is his intention and desire to remain in the Dickman house until the termination of the lease in May

of 1973. Michael Miranda is a graduate student in sociology at Stony Brook. He is uncertain as to whether he will remain in the Dickman house. Leonard Cassara is an undergraduate student at Stony Brook. He intends to leave the Dickman hosue on or before September 1, 1972.

17. It is the desire and intention of plaintiff's Boraas, Parish and Truman to secure additional co-residents to replace Leonard Cassara and Michael Miranda, if the latter decides to leave the premises. The number of persons residing in the Dickman house will thus be maintained at six. It is the desire and intention of the plaintiffs to secure fellow Stony Brook students as such additional co-residents.

18. The Dickman house has six bedrooms, and each of the residents has his own bedroom. The rent and security deposit is apportioned among the six upon the basis of their mutual judgment as to the quality of the bedroom which they occupy. Plaintiff Boraas contributes $85 per month and has paid $170 towards the deposit. Plaintiff Parish contributes $90 per month and has paid $180 towards the deposit. Plaintiff Truman contributes $95 per month and has paid $190 towards the deposit.

19. The six tenants of the Dickman house, of which the plaintiffs are three, are organized and function as a single housekeeping unit. More particularly.

A. Dinner is a common meal; the chores of cooking this meal, washing dishes, and so forth, are distributed on a scheduled basis among the six tenants;

B. Chores connected with the general housekeeping and cleaning functions within the house are likewise distributed equally as per schedule;

C. Every two weeks, there is a scheduled "yard day" during which each tenant is expected to participate in common yard keeping functions such as lawn mowing; and

D. Plaintiff Anne Parish is the household "treasurer." In this capacity, she collects joint contributions for the common shared expenses of groceries, telephone service, newspaper delivery, basic utilities, fuel oil, and milk delivery. A house checking account has been established from which these disbursements and a joint rent check are drawn.

20. Each of the plaintiffs, prior to assuming residence in the Dickman house, undertook an extensive search for rental opportunities within the vicinity of Stony Brook. Each found that, except for university dormitory accommodations, the only rental situations which they could possibly afford were shared residences like the Dickman house. Traditional apartment rentals, when available, were beyond their means. In addition, each of the plaintiffs has determined that a cooperative housing arrangement with other students with common academic interests —like that which has evolved in the Dickman house—is an attractive, congenial and convenient residential life style, and one which affords a useful forum for scholarly exchange.

21. None of the six present residents of the Dickman house is related to any of the other residents by blood, adoption or marriage.

22. The Village of Belle Terre has a residents-only beach, access to which requires a resident permit. Defendant Stolz, dispenses such permits to residents on behalf of the Village.

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

23. On June 8, 1972, Plaintiffs Boraas and Truman visited Defendant Francis R. Stolz at his residence in the Village of Belle Terre. They requested beach permits for themselves and their co-tenants. Stolz declined to issue such permits. His explanation was that the residents of the Dickman house were "illegal residents" of the Village, and as such, were not entitled to beach permits. Further, Defendant Stolz informed Plaintiffs Boraas and Truman that "papers are being prepared against you and Mrs. Dickman by the Village."

24. On or about June 13, 1972, Plaintiffs Boraas and Parish attended a meeting of the Village of Belle Terre Board of Trustees. When questions from the floor were invited, Plaintiff Boraas rose and sought to inquire as to the official Village position on all matters alluded to by Defendant Stolz on June 8 (see paragraph 23, above). Defendant Stolz responded to this inquiry with a statement to the effect that a violation of the Village zoning ordinance was being perpetuated in the Dickman house because it was not being occupied by a single family and further, that the Village intended to institute legal proceedings to terminate this violation.

25. The Building Zone Ordinance of the Village of Belle Terre includes the following provisions, which, in effect, prescribe the following provisions, which, in effect, proscribe the occupancy of any residence within the Village by more than two persons not related by blood, adoption or marriage:

"ARTICLE I DEFINITIONS

"D-1.34a. One Family Dwelling. A detached house consisting of or intended to be occupied as

a residence by one family only as family is hereafter defined. In no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family.

"D-1.35a. Family. One or more persons related by blood, adoption or marriage, living and cooking together as a single house keeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

* * *

"ARTICLE II DISTRICTS

"Section DT-1.0. For the purpose of this Ordiance the Village of Belle Terre will consist of one (1) district to be known as 'A' Residence District.

"DT-1.1 The boundary of said district is hereby established as identical to the Village boundaries.

"DT-1.2 No building shall be erected, altered, or used and no premises shall be used for any other than a purpose permitted in this "A" residential zone.

"ARTICLE III "A" RESIDENCE DISTRICT

"Section A-1.0. "A" Residence District to building or premise shall be used and no building shall hereafter be erected or altered unless provided in this Ordinance except for one (1) or more of the following uses:

(1) One family dwellings.

(2) Public parks, playgrounds, recreational areas, and real property and structures owned and operated by the municipality and for municipal purposes of the Village of Belle Terre.

(3) Accessory buildings, including one (1) private garage when located on the same lot and when meeting requirements of Article III, Section A-1.4a; A-1.4b; and A-1.4c and when such buildings are incidental to the principal use of the dwelling and do not include any activity commonly conducted as a business. The private garage may be within or attached to the dwelling."

26. On July 19, 1972, Edwin and Judith Dickman, lessors of the Dickman house, were served with a document entitled "Criminal Summons," a copy of which is attached hereto as an exhibit. That Summons commanded the Dickmans to appear before Hon. John Leach, the Belle Terre Village Justice, at 7:00 P.M. on July 28, 1972. The Summons stated that it was issued upon the complaint of Harriet Coorssen that the Dickmans "cease rent and/or otherwise permit . . . [their] premises located at Cliff Road, Belle Terre, Suffolk County, New York to be used other than as a one family dwelling." The named complainant, Harriet Coorssen, is Clerk and Treasurer of the Village of Belle Terre.

27. On July 28, 1972, the scheduled date of the criminal hearing to which the July 19, 1972 Summons referred, the Village Counsel, James V. von Oiste, informed the Dickmans' attorney, Allen Wolfsont, Esq., that the Summons was being withdrawn. It was so withdrawn, and no criminal prosecution is presently pending.

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

28. Upon information and belief, the July 19, 1972 Summons served upon the Dickmans was withdrawn because of a discovered defect in the Village's procedure, to wit, its failure to comply with the requirements of Article IV, Section P-1.13a of the Village Building Zone Ordinance, which provides that "A person . . . who fails to comply with any order of the Building Inspector within 48 hours following the receipt of said order shall be deemed to have violated this Ordinance." Prior to their receipt of the July 19, 1972 criminal summons, the Dickmans had received no order or notice of any kind from the Village pertaining to their alleged violation of the ordinance because of the occupancy of the Dickman house by plaintiffs Boraas, Parish and Truman and the other Stony Brook students.

29. Upon information and belief, the Village of Belle Terre, through the defendants in their official capacities, intends to reinstitute criminal proceedings against the plaintiffs Edwin and Judith Dickman, charging a violation of the Village Building Zone Ordinance based upon the occupancy of the Dickman house by plaintiffs Boraas, Parish and Truman and their three additional co-residents.

30. On July 31, 1972, the Dickmans were served, by registered mail, an "order" or "notice of violation" issued by the Village Building Inspector, Abe Seifert. This document, which is appended hereto as an exhibit, indicates that on August 3, 1972—48 hours after the service of the order —if the Dickman premises are not in conformity with the single family occupancy provision of the Building Zone Ordinance, the Dickmans will be exposed to criminal fines and/or imprisonment.

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

31. The Building Zone Ordinance of the Village of Belle Terre, Article VIII, § M-1.4a(2), provides that each violation of its provisions shall constitute "disorderly conduct." Further, said section provides that the owner and lessee or tenant of a building where a violation occurs "shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues."

32. Upon information and belief, if the defendants do not succeed in terminating the residence in the Dickman house of plaintiffs Boraas, Parish and Truman and their three co-residents through the criminal prosecution of the plaintiffs Dickman, they will resort to other means designed to accomplish that end, including criminal prosecution of Boraas, Parish and Truman and civil actions against some or all of the plaintiffs.

33. Plaintiffs Boraas, Parish and Truman desire to use the Village of Belle Terre beach. Such use is a normal incident of residence in the Village, and is secured by Village Ordinance No. 19. Without a beach permit, any use of the beach is prohibited by Ordinance 19, and each occasion of unlawful use is subject to a fine of $20.00 and constitutes a criminal violation.

34. The Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage, deprives the plaintiffs of rights secured to them

by the Constitution of the United States, and more particularly:

A. The ordinance denies the plaintiffs equal protection of the laws;

B. The ordinance violates the right of association secured to the plaintiffs by the First and Fourteenth Amendments;

C. The ordinance intrudes upon the sphere of privacy secured to the plaintiffs by diverse provisions of the Constitution; and

D. The ordinance contravenes the right to travel likewise secured to the plaintiffs.

35. Unless the Court awards the plaintiffs the relief prayed for below, they will suffer immediate and irreparable injury. More particularly:

A. Plaintiffs Edwin and Judith Dickman will be liable to substantial criminal penalties, which are cumulative for each day after August 3, 1972 during which the single family occupancy provisions of the Building Zone Ordinance are violated.

B. Plaintiffs Boraas, Parish and Truman are likewise liable to such criminal penalties. Further they are exposed to the very substantial risk that the Dickmans, if they are unable to secure the relief prayed for herein, will be forced to undertake to remove them in order to avoid the cumulative criminal liability. Finally, plaintiffs Boraas, Parish and Truman are presently being denied access to the Village of Belle Terre Beach, which access is by Village law made an incident of residence in the Village.

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

IV. Prayer for Relief

WHEREFORE, plaintiffs pray for the following relief:

1. A temporary restraining order, restraining the defendants and anyone acting in concert with them, from instituting criminal or civil proceedings against any of the plaintiffs to enforce the provisions of the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage, and from taking any other steps intended to have or having the effect of enforcing said provisions, including the withholding of any of the normal rights and privileges of residence within the Village, such as beach privileges.

2. A preliminary and a permanent injunction each enjoining the defendants, their successors in office, and anyone acting in concert with them, from instituting criminal or civil proceedings against any of the plaintiffs to enforce the provisions of the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage, and from taking any other steps intended to or having the effect of enforcing said provisions, including the withholding of any of the normal rights and privileges of residence within the Village, such as beach privileges.

3. A judgment declaring the Building Zone Ordinance of the Village of Belle Terre unconstitutional, insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage.

4. Such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ BRUCE J. ENNIS
Bruce J. Ennis

/s/ LAWRENCE G. SAGER
Lawrence G. Sager

/s/ ARTHUR N. EISENBERG
Arthur N. Eisenberg

New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

EXHIBIT ANNEXED TO COMPLAINT

Police Justice Court.

STATE OF NEW YORK,
COUNTY OF SUFFOLK } ss.:
VILLAGE OF BELLE TERRE

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To:

EDWIN DICKMAN and JUDITH DICKMAN.

COMPLAINT having been made this day by HARRIET COORSSEN that you lease, rent and/or otherwise permit your premises located at Cliff Road, Belle Terre, Suffolk County, New York to be used other than as a one-family dwelling.

YOU ARE HEREBY SUMMONED to appear before me, Honorable John Leach, at Community Center, Cliff Road, in the Village of Belle Terre, N. Y., on the 28th day of July, 1972 at 7:00 o'clock P.M., to the end that an investigation may be made of said complaint: and upon your failure to appear at the time and place mentioned, you are liable to a fine of not exceeding ONE-HUNDRED DOLLARS for each day during or on which the violation occurs or continues or by imprisonment for a period not exceeding 60 days or by both fine and imprisonment.

Dated at the Village of Belle Terre
N. Y., the 18th day of July, 1972

JOHN M. LEACH
Village Justice

Complaint and Exhibits (Criminal Summons and Order to Remedy Violations)

EXHIBIT ANNEXED TO COMPLAINT

INCORPORATED VILLAGE OF BELLE TERRE
COMMUNITY CENTER
CLIFF ROAD
BELLE TERRE, NEW YORK 11777

ORDER TO REMEDY VIOLATION

Location (address)—Northwest corner of Cliff Road and Harbor View Drive, Belle Terre, New York 11777

Date: July 28, 1972

To:

Edwin Dickman & Judith Dickman
(owner or authorized agent of owner)
85 Nesconset Highway, Port Jefferson Station,
N. Y. 11776
(address of owner or authorized agent of owner)

PLEASE TAKE NOTICE there exists a violation of Article III, Section 9-1.O. of the Village Code at premises hereinafter described in that premises used other than as a one family dwelling.

YOU ARE THEREFORE DIRECTED AND ORDERED to comply with the law and to remedy the conditions above mentioned forwith on or before the 3rd day of August, 1972.

Failure to remedy the conditions aforesaid and to comply with the applicable provisions of law may constitute an offense punishable by fine or imprisonment or both.

/s/ ABE SEIFERT
Abe Seifert

Affidavit of Lawrence G. Sager in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

LAWRENCE G. SAGER, being duly sworn, deposes and says:

1. I am an attorney for the plaintiffs in the above-styled cause. I make this affidavit in support of plaintiffs' claim that immediate and irreparable injury will befall plaintiffs if the temporary restraining order and preliminary injunction prayed for in this cause are not granted.

2. On July 27, 1972 and July 28, 1972, I had several telephone conversations with James V. von Oiste, Counsel for the Village of Belle Terre. These conversations were initiated by me, and were for the purposes of exploring the Village's intentions regarding the matters in this cause and of informing Mr. von Oiste of the plaintiffs'—at the time of the calls in question I represented only Boraas, Parish and Truman—intention to proceed in federal Court.

3. In the course of our conversations, Mr. von Oiste acknowledged that there was possibly a procedural defect in the then pending criminal prosecution of the Dickmans, to wit, that the Village had failed to serve the Dickmans with an Order of the Village Building Inspector prior to commencing the action. Article IV, Section P-1.13a of

the Building Zone Ordinance makes a personal violation of the ordinance contingent upon a 48 hours notice by means of an order of the Village Building Inspector.

4. In the course of our conversations Mr. von Oiste indicated that he intended to do three things. First, he intended to withdraw the criminal summons of July 19, 1972 immediately. Second, he intended to serve the Dickmans with an order executed by the Village Building Inspector. And third, he intended to reinstitute criminal proceedings against the Dickmans.

5. To the best of my knowledge, supported by my telephone conversations with Mr. von Oiste, Allen Wolfsont, Esq. (the Dickmans' attorney in the local proceeding) and the Hon. John Leach (the Village Justice), the criminal summons was withdrawn during the afternoon of July 28, 1972.

6. On July 31, 1972, the Dickmans were served with an "Order to Remedy Violation", executed by Abe Seifert, Village Building Inspector, and sent by certified mail in an envelope bearing the return address of Mr. von Oiste's law offices. Copies of said order are attached to the Complaint herein, and to the affidavit of Judith Dickman.

7. It is clear that criminal prosecution of the Dickmans is imminent. The Village will charge that the Dickmans' criminal liability runs from a point 48 hours after the service of the "Order to Remedy Violation," viz., August 3, 1972. These are the precise terms of the Order itself. By the terms of the Building Zone Ordinance, each day during which a violation exists constitutes a "separate and distinct offense" of disorderly conduct, and each day sub-

jects the Dickmans to a separate and distinct liability of $100.00 or 60 days in jail.

8. Unless this Court intervenes now, the pressure upon the Dickmans to undertake to remove the students from their Belle Terre house will be very great. With the potential penalties mounting daily, the Dickmans, as Judith Dickman's affidavit indicates, will be unable to risk maintaining the students as tenants with the hope of eventual vindication through the States criminal process.

9. If the plaintiffs Boraas, Parish and Truman are required to leave the Dickman house, or indeed, if they are threatened seriously with the prospects of eviction, they will be forced to seek new housing situations. With the "illegal" use of the Dickman house abated, and the student plaintiffs relocated in another municipality, the compelling constitutional claims of the plaintiffs will be mooted, and the constitutional injuries which they assert beyond any possible redress.

10. In the meantime, plaintiffs Borass, Parish and Truman are being denied access to the Village beach, which access is made by Village Ordinance a perogative of all residents in the Village. This injury, which surely less grave than complete exclusion from the home and community of their choosing, is nonetheless a real injury which is entitled to protection against unconstitutional deprivation. This loss too, can never be compensated; only immediate judicial intervention can prevent its continued occurrence.

LAWRENCE G. SAGER

(JURAT OMITTED IN PRINTING)

Affidavit of Arthur N. Eisenberg in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR N. EISENBERG, being duly sworn, deposes and says:

1. I am an attorney for the plaintiffs in the above-styled cause. I make this affidavit in support of plaintiffs' claim that they will suffer immediate and irreparable injury unless they are permitted to proceed by order to show cause in this action.

2. As noted in the affidavit of Lawrence G. Sager, it is clear that the criminal prosecution of plaintiffs Edwin and Judith Dickman is imminent. The Village officials have clearly taken the position that the Dickmans are violating the Belle Terre zoning ordinance. Accordingly, the defendants undoubtedly assert that the Dickmans' criminal liability runs from a point 48 hours after the service of an "Order to Remedy Violation" executed by Abe Seifert, Village Building Inspector, received by the Dickmans on July 31, 1972. By the terms of the Building Zone Ordinance, each day during which a violation exists constitutes a "separate and distinct offense" of disorderly conduct, and

each day subjects the Dickmans to a separate and distinct liability of $100.00 or 60 days in jail.

3. Unless this action proceeds as expeditiously as possible, the pressure upon the Dickmans to undertake to remove the students from their Belle Terre house will be very great. With the potential penalties mounting daily, the Dickmans, as Judith Dickman's affidavit indicates, will be unable to risk maintaining the students as tenants with the hope of eventual vindication through the state criminal process.

4. If the plaintiffs Boraas, Parish and Truman are required to leave the Dickman house, or indeed, if they are threatened seriously with the prospects of eviction, they will be forced to seek new housing situations. Morever, as the affidavits of plaintiffs Boraas, Parish and Truman indicate, such plaintiffs have been threatened with legal action for their alleged violation of the zoning ordinance of the Village of Belle Terre.

5. Upon the foregoing facts, plaintiffs wish to proceed herein as expenditiously as possible and are consequently seeking preliminary equitable relief by order to show cause rather than notice of motion.

6. Lawrence G. Sager, co-counsel for plaintiffs herein has been in telephonic communication with the office of James V. von Oiste, counsel for the Village of Belle Terre. On August 1, 1972, Mr. Sager telephoned Mr. von Oiste's office on two occasions for the express purpose of notifying counsel for defendants herein of plaintiffs' intention to seek a temporary restraining order from this court. During

Affidavit of Arthur N. Eisenberg in Support of Plaintiffs' Motion for Preliminary Equitable Relief

Mr. Sager's second telephone communication with Mr. von Oiste's office, on August 1, 1972, Mr. Sager spoke with Mr. Carter who explained that he was Mr. von Oiste's law partner, that Mr. von Oiste was vacationing, and that Mr. Carter was handling Mr. von Oiste's affairs while the latter was away. Mr. Sager announced to Mr. Carter that it was plaintiffs' intention to seek a temporary restraining order from this court on either the afternoon of August 1, 1972 or the morning of August 2, 1972.

7. No identical or similar relief has previously been sought by plaintiffs herein.

.....

ARTHUR N. EISENBERG

(JURAT OMITTED IN PRINTING)

Affidavit of Bruce Boraas in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

BRUCE BORAAS, being duly sworn, deposes and says:

1. I am 24 years old. I am entering my third year of graduate study at the State University of New York at Stony Brook. I am working towards a doctorate in sociology and I hold a research assistantship at the University.

2. On June 1, 1972, I signed a lease for the house owned by Edwin and Judith Dickman at the intersection of Harbor View Road and Cliff Road, in Belle Terre, New York. The copy of the lease which I signed was identical to that signed by Michael Truman earlier, except my name was added as lessee.

3. I presently reside in the Dickman house; it is my intention and desire to remain in the Dickman house until the termination of the lease in May of 1973, during which time I will continue my graduate studies.

4. Five other Stony Brook students reside in the Dickman House. These are: Anne Parish, Michael Truman, Franklin Beckman, Michael Miranda and Leonard Cassara.

Beckman intends to remain in the premise until the termination of the lease; Miranda is uncertain, and Cassara definitely intends to leave. It is the intention of my fellow residents and myself to maintain the number of persons in the Dickman house at six, and to secure fellow Stony Brook students to replace anyone who leaves.

5. The Dickman house has six bedrooms and each resident has his own bedroom. The six residents are organized and function as a single housekeeping unit. More particularly:

A. Dinner is a common meal; the chores of cooking this meal, washing dishes, and so forth, are distributed on a scheduled basis among the six tenants;

B. Chores connected with the general housekeeping and cleaning functions within the house are likewise distributed equally as per schedule;

C. Every two weeks, there is a scheduled "yard day" during which each tenant is expected to participate in common yard keeping functions such as lawn mowing; and

D. Plaintiff Anne Parish is the household "treasurer." In this capacity, she collects joint contributions for the common shared expenses of groceries, telephone service, newspaper delivery, basic utilities, fuel oil, and milk delivery. A house checking account has been established from which these disbursements and a joint rent check are drawn.

6. Prior to assuming residence in the Dickman House, I undertook a search for rental opportunities in the vicinity of Stony Brook (the Dickman house is a 15 minute drive from Stony Brook). I found that, except for University dormitory accommodations, the only rental situations which

I could afford were shared residences like the Dickman house. Apartment rentals, when available were too expensive. Further, I have determined that the Dickman house arrangement affords an attractive, convenient and congenial residential life style—and one which affords a useful forum for scholarly exchange.

7. To the best of my knowledge, none of the six residents of the Dickman house is related to any other by blood, adoption or marriage.

8. On June 8, 1972, with Michael Truman, I visited Francis R. Stolz in his residence in the Village of Belle Terre. We requested beach permits, having been informed that Mr. Stolz was the appropriate Village official. He refused to give us permits, saying that the residents of the Dickman house were "illegal residents" of the Village and that "papers are being prepared against you and Mrs. Dickman by the Village."

9. On or about June 13, 1972, with Anne Parish, I attended a meeting of the Village of Belle Terre Trustees. At an appropriate interval, I rose and inquired about Mr. Stolz's statements on June 8, 1972. Mr. Stolz and other members of the Board of Trustees responded with statements to the effect that a violation of the Village zoning ordinance was taking place in the Dickman house, since it was not being occupied by a single family and further, that the Village intended to institute legal proceedings against this violation.

10. I desire to use the beach of the Village.

11. I am a plaintiff in the above-styled cause.

BRUCE BORAAS

Affidavit of Anne Parish in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

ANNE PARISH, being duly sworn, deposes and says:

1. I am a plaintiff in the above-styled cause.

2. I am 23 years old. I am enrolled as a third year undergraduate student at the State University of New York at Stony Brook for the academic year which commences in September of 1972.

3. I presently reside in the house owned by Edwin and Judith Dickman which is located at the intersection of Harbor View Road and Cliff Road, in the incorporated Village of Belle Terre. I desire and intend to remain in the Dickman house until the termination of the lease in May of 1973, during which period I will pursue my undergraduate studies at Stony Brook.

4. Prior to assuming residence in the Dickman house, I undertook a search for rental opportunities in the vicinity of Stony Brook (the Dickman house is a 15 minute drive from Stony Brook). I found that, except for University dormitory accommodations, the only rental situations which

I could afford were shared residences like the Dickman house. Apartment rentals, when available, were too expensive. Further, I have determined that the Dickman house arrangement affords an attractive, convenient and congenial residential life style—and one which affords a useful forum for scholarly exchange.

5. On or about June 13, 1972, with Bruce Boraas, I attended 1 meeting of the Village of Belle Terre Board of Trustees. In response to an inquiry by Mr. Boraas, defendant Stolz and other members of the Board of Trustees made statements to the effect that a violation of the Village zoning ordinance was taking place in the Dickman house, since it was not being occupied by a single family and further, that the Village intended to institute legal proceedings against this violation.

6. To the best of my knowledge, none of the six residents of the Dickman house is related to any other by blood, adoption or marriage.

7. I desire to use the Village of Belle Terre beach.

ANNE PARISH

(JURAT OMITTED IN PRINTING)

Affidavit of Michael Truman in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

MICHAEL TRUMAN, being duly sworn, deposes and says:

1. I am a plaintiff in the above-styled cause.

2. I am 25 years old. I am entering my fourth year of graduate study at the State University of New York at Stony Brook. I am working towards a doctorate in sociology, and I hold a teaching assistantship at the University.

3. On or about December 1, 1971, I signed a lease for the house owned by Edwin and Judith Dickman at the intersection of Harbor View Road and Cliff Road in Belle Terre, New York. The lease is to terminate on May 31, 1973. The stipulated rent was $500.00 per month, and a security deposit of $1,000.00 was required.

4. I presently reside in the Dickman house: it is my intention and desire to remain in the Dickman house until the termination of the lease in May of 1973, during which time I will continue my graduate studies.

Affidavit of Michael Truman in Support of Plaintiff's Motion for Preliminary Equitable Relief

5. Prior to assuming residence in the Dickman House, I undertook a search for rental opportunities in the vicinity of Stony Brook (the Dickman house is a 15 minute drive from Stony Brook). I found that, except for University dormity accommodations, the only rental situations which I could afford were shared residences like the Dickman house Apartment rentals, when available were too expensive. Further, I have determined that the Dickman house arrangement affords an attractive, convenient and congenial residential life style—and one which affords a useful forum for scholarly exchange.

6. On June 8, with Bruce Boraas, I visited Francis R. Stolz in his residence in the Village of Belle Terre. We requested beach permits, having been informed that Mr. Stolz was the appropriate Village official. He refused to give us permits, saying that the residents of the Dickman house were "illegal residents" of the Village and that "papers are being prepared against you and Mrs. Dickman by the Village."

7. To the best of my knowledge, none of the six residents of the Dickman house is related to any other by blood, adoption or marriage.

8. I desire to use the Village of Belle Terre beach.

MICHAEL TRUMAN

(JURAT OMITTED IN PRINTING)

Affidavit of Judith Dickman in Support of Plaintiffs' Motion for Preliminary Equitable Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

JUDITH DICKMAN, being duly sworn, deposes and says:

1. I am a plaintiff in the above-styled cause.

2. With my husband, I own a house located at the intersection of Harbor View Road and Cliff Road, in the incorporated Village of Belle Terre, Suffolk County.

3. That house is presently being leased. Both Michael Truman and Bruce Boraas are signatories to the written lease. The term expires on May 31, 1973. I am aware that Anne Parish is residing in the premises as well.

4. On July 19, 1972, my husband and I received a document executed by Belle Terre Village Justice John Leach, entitled "Criminal Summons." A copy of that document is appended hereto as an exhibit. My husband and I retained Allen Wolfsont, Esq. to represent me in the matter referred to in the Summons.

5. On July 28, 1972, Mr. Wolfsont advised me that he had spoken to James V. von Oiste, Village Counsel, and that

Mr. von Oiste had assured him that the summons would be withdrawn. Upon Mr. Wolfsont's advice, I did not attend the hearing specified in the July 19, 1972 summons, which was scheduled for July 28, 1972 at 7:00 P.M.

6. Today, on July 31, 1972, my husband and I received, by registered mail, an "Order" signed by Village Building Inspector Abe Seifert (Mr. Seifert is also chairman of the Village Zoning Commission). A copy of that order is attached hereto as an exhibit. By its terms, my husband and I are liable to cumulative fines and/or imprisonment if we do not comply with the single family provisions of the Village Zoning Ordinance by August 3, 1972.

7. My husband and I regard the present residents of our Belle Terre house as desirable tenants who are reliable and who have maintained the premises well. It is in our economic interest to continue to rent to them. Moreover, we are sympathetic to the needs of responsible students at Stony Brook who are unable to find adequate housing at a cost which they can afford.

8. Unless the Court affords us the immediate relief which our counsel in the instant case have requested, we will be exposed to cumulative criminal penalties which will mount on a daily basis. We will thereby be compelled to undertake to remove these tenants. If this happens, we will be injured. they will be injured, and all of us will lose the opportunity to litigate our rights in this matter.

JUDITH DICKMAN

(JURAT OMITTED IN PRINTING)

Summons

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action File No. 72C 1030

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre. ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

To the above named Defendant:

You are hereby summoned and required to serve upon

Bruce J. Ennis
Lawrence G. Sager
Arthur N. Eisenberg

plaintiff's attorneys, whose address

New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon

you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

LEWIS ORGEL
Clerk of Court

By MILDRED LOZENSKY
Deputy Clerk

Dated: August 2, 1972

[Seal of Court]

Defendants' Answer

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

The Defendants, appearing herein, by their attorney, James J. von Oiste, Village Attorney of the Incorporated Village of Belle Terre, as and for their answer to the complaint of the plaintiffs, respectfully show to this Court and allege:

First: Denies that the jurisdiction of this Court is properly invoked under Title 28, United States Code, Sections 1331a., 1343, and 2201 or is authorized by Title 42, United States Code, Section 1983.

Second: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 2 of the complaint; except admits that Bruce Boraas lives in a residence within the Incorporated Village of Belle Terre.

Third: Denies each and every allegation contained in paragraph 3 of the complaint; except admits that Anne Parish lives in a residence within the Incorporated Village of Belle Terre.

Fourth: Denies each and every allegation contained in paragraph 4 of the complaint; except admits that Michael Truman lives in a residence within the incorporated Village of Belle Terre.

Fifth: Admits the allegations contained in paragraph 5 of the complaint.

Sixth: Admits the allegations contained in paragraph 6 of the complaint.

Seventh: Admits the allegations contained in paragraph 7 of the complaint.

Eighth: Denies each and every allegation contained in paragraph 8 of the complaint.

Ninth: Admits the allegations contained in paragraph 9 of the complaint.

Tenth: Admits the allegations contained in paragraph 10 of the complaint.

Eleventh: Admits the allegations contained in paragraph 11 of the complaint.

Twelfth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 12 of the complaint.

Thirteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 13 of the complaint; except admits that plaintiff Michael Truman resides in the Dickman house.

Fourteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 14 of the complaint; except admits that plaintiff Bruce Boraas resides in the Dickman house.

Defendants' Answer

Fifteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 15 of the complaint; except admits that the plaintiff Parish resides in the Dickman house.

Sixteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 16 of the Complaint; except admits that Franklin Beckman, Michael Miranda and Leonard Cassara reside in the Dickman house.

Seventeenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 17 of the complaint.

Eighteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 13 of the complaint.

Nineteenth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 19 of the complaint.

Twentieth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 20 of the complaint.

Twenty-first: Admits the allegations contained in paragraph 21 of the complaint.

Twenty-second: Admits the allegations contained in paragraph 22 of the complaint.

Twenty-third: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 23 of the complaint.

Twenty-fourth: Admits the allegations contained in paragraph 24 of the complaint.

Twenty-fifth: Admits the allegations contained in paragraph 25 of the complaint.

Twenty-sixth: Admits the allegations contained in paragraph 26 of the complaint.

Twenty-seventh: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 27 of the complaint.

Twenty-eighth: Admits the allegations contained in paragraph 28 of the complaint.

Twenty-ninth: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 29 of the complaint.

Thirtieth: Admits the allegations contained in paragraph 30 of the complaint.

Thirty-first: Admits the allegations contained in paragraph 31 of the complaint.

Thirty-second: Denies each and every allegation contained in paragraph 32 of the complaint.

Thirty-first: Admits the allegations contained in paragraph 33 of the complaint.

To:

LAWRENCE G. SAGER,
ARTHUR N. EISENBERG,
BRUCE J. ENNIS,
NEW YORK CIVIL LIBERTIES UNION,
84 Fifth Avenue,
New York, N. Y. 10011
(212) 924-7800
Attorneys for Plaintiffs.

Affidavit of James J. von Oiste in Opposition to Plaintiffs' Motion for a Preliminary Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

JAMES J. von CISTE, being duly sworn, deposes and says:

1. Your dependent is the attorney for the defendants in this proceeding and makes this affidavit in opposition to the plaintiffs' request for a preliminary and permanent injunction and declaratory judgment.

2. The moving affidavits recite a great number of conclusions to the effect that the plaintiffs will sustain immediate and irreparable injury unless a temporary restraining order and a preliminary injunction is granted in this cause. None of these statements are supported by fact. For example the plaintiffs allege that their present living arrangement affords them "an attractive, convenient and congenial life style—and one which affords a useful forum for scholarly exchange." They do not allege that there are no accommodations to be had elsewhere, but simply that they have not found any accommodations where they can maintain the same "life style" which is available to them in the Dickman house. Even if this were conceded, which it is not, the fact that the plaintiffs were not able to continue their present "convenient and congenial residential life style" does not

represent any interference with their constitutional rights and certainly does not entitle them to the drastic relief which they seek in these proceedings.

3. On August 15, 1972 your deponent spoke with Mr. John Ciarelli the associate director of housing for the State University at Stony Brook the school which the plaintiffs attend. Mr. Ciarelli advised your deponent that there are twenty-seven dormitory buildings on campus which can accommodate approximately 6200 students. The accommodations range from single and double rooms to suites which accommodate 4 to 6 students in each suite.

4. Your deponent was advised that there are a considerable number of vacancies available at the university. As a matter of fact the supply of on campus housing facilities so far exceed the demand that two of the buildings will not be opened for the academic year 1972 to 1973.

5. The cost of on campus housing is $650.00 per year per student which is considerably less than the plaintiffs pay the Dickmans.

6. Your deponent does not mean to suggest that the plaintiffs seek on campus housing; however other housing is available to them.

7. Belle Terre has a population of approximately 700 and is an incorporated village within the Town of Brookhaven which has a population of approximately 250,000.

8. The highest zone classification in the Town of Brookhaven is designated "A" Residence District and permits only one-family dwellings.

Affidavit of James J. von Oiste in Opposition to Plaintiffs' Motion for a Preliminary Injunction

9. An unlimited number of unrelated peoples may live together in the "A" Residence District in the Town of Brookhaven.

10. Plaintiffs could live anywhere in the Town of Brookhaven and even its highest zoned district would not interfere with their present life style.

11. If the plaintiffs applied to the local real estate brokers they would discover that there are several houses available in the immediate vicinity of the university where they may live together and not be in violation of an ordinance.

WHEREFORE, your deponent respectfully requests that the court deny the preliminary injunction, and all further relief sought by the plaintiffs.

JAMES J. VON OISTE

(JURAT OMITTED IN PRINTING)

Affidavit of Harriet Coorssen in Opposition to Plaintiffs' Motion for a Preliminary Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING)

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

HARRIET COORSSEN, being duly sworn, deposes and says:

1. I am the Village Clerk and Treasurer of the Incorporated Village of Belle Terre.

2. Belle Terre is a Fourth Class Village as defined in the Village Law, State of New York.

3. The total land area of the Village of Belle Terre is approximately one (1) square mile.

4. The total population of Belle Terre is approximately 700.

5. There are 220 homes within the Village, all of which are one-family dwellings. Two houses directly opposite the Dickman house had previously been rented. The house directly opposite the Dickman's to the south is a four bedroom house. I spoke with the owner and was advised that it rents for $350.00 per month completely furnished. The house directly opposite the Dickman's to the southwest is a six bedroom house. I spoke with the former tenant who

had leased the house until one month ago and was advised that the rent paid was $350.00 per month and the house was completely furnished.

HARRIET COORSSEN

(JURAT OMITTED IN PRINTING)

Omissions from Appendix

The following items are omitted from this Appendix because they are printed in the jurisdictional statement as follows:

Opinion of the Court of Appeals for the Second Circuit on the merits ..... J.S. 1a

Order and Opinion of the Court of Appeals denying rehearing en banc ..... J.S. 40a

Opinion of the District Court for the Eastern District of New York ..... J.S. 51a

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Judgment of the District Court ..... J.S. 83a

Notice of Appeal to the Supreme Court of the United States ..... J.S. 86a

FILE
JUL 27
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

BERNARD E. GEGAN
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Village Attorney, Village of Belle Terre
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IN THE

Supreme Court of the United States

October Term, 1973

No.

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Second Circuit, entered on May 1, 1973, affirming a judgment of the United States District Court for the Eastern District of New York declaring unconstitutional and permanently enjoining the enforcement of a portion of the zoning ordinance of the Village of Belle Terre. Appellants submit this Statement

to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

There was no opinion filed by the Second Circuit Court of Appeals with its final judgment affirming the declaratory judgment and permanent injunction. The opinion on the merits was delivered at an earlier stage in the proceeding when the Court of Appeals reversed the Eastern District Court's denial of a preliminary injunction and remanded the case. This opinion, together with two opinions filed upon the denial of rehearing *en banc*, is reported in 467 F.2d 806. The opinion of the District Court in originally denying the preliminary injunction is unreported. The District Court did not deliver an opinion when, upon remand, it granted the declaratory judgment and permanent injunction.

Jurisdiction

This action was brought by Plaintiffs-Appellees under the Federal Civil Rights Act of 1871, 42 U.S.C. sec. 1983, to declare unconstitutional and enjoin the enforcement of a portion of the one family zoning ordinance of the Village of Belle Terre, New York. The District Court for the Eastern District of New York denied Plaintiff's motion for a preliminary injunction on the ground that the zoning ordinance was constitutional. Plaintiffs appealed to the Court of Appeals for the Second Circuit which on February 27, 1973 found the ordinance unconstitutional and reversed and

remanded for further proceedings consistent with its opinion* (476 F.2d 806). A poll of the active judges resulted in a denial of rehearing *en banc* by an equally divided vote on March 16, 1973, with two opinions—reported with the principal opinions. Upon remand the District Court entered a judgment declaring a portion of the zoning ordinance unconstitutional and permanently enjoining its enforcement. Defendants-Appellants appealed this judgment to the Second Circuit Court of Appeals, which finally affirmed without additional opinion on May 1, 1973.

The appeal to this Court lies under 28 U.S.C. sec. 1254 (2) since the Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under section 1254 (2) *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 82 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962); Stern & Gressman, Supreme Court Practice 31-32 (1969).

Relevant Ordinance Provisions

Building Zone Ordinance of the Village of Belle Terre

ART. II, *Section DT-1.0.* For the purpose of this Ordinance the Village of Belle Terre will consist of one (1) district to be known as "A" Residence District.

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* As a precautionary measure Defendants-Appellants filed a notice of appeal to this Court from the above mentioned judgment. Since, however, the granting of a preliminary injunction is not a final judgment for the purpose of appeal to this Court as required by *Slaker* v. *O'Conner*, 278 U.S. 188 (1929) and *South Carolina Elec. & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956), Defendants-Appellants are prosecuting this appeal from the Court of Appeals' final judgment of May 1, 1973, affirming the declaratory judgment of unconstitutionality and permanent injunction.

DT-1.1. The boundary of said district is hereby established as identical to the Village boundaries.

DT-1.2. No building shall be erected, altered, or used and no premises shall be used for any other than a purpose permitted in this "A" residential zone.

ART. III, *Section A-1.0.* "A" Residence District no building or premise shall be used and no building shall hereafter be erected or altered unless provided in this Ordinance except for one (1) or more of the following uses:

(1) One family dwellings

(2) Public parks, playgrounds, recreational areas, and real property and structures owned and operated by the municipality and for municipal purposes of the Village of Belle Terre.

(3) Accessory buildings, including one (1) private garage when located on the same lot and when meeting requirements of Article III, Section A-1.4a: A-1.4b: and A-1.4c and when such buildings are incidental to the principal use of the dwelling and do not include any activity commonly conducted as a business. The private garage may be within or attached to the dwelling.

ART. I, *D-1.34a.* One Family Dwelling. A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined, in no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family.

D-1.35a. Family. One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A

number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

ART. VIII, *Section M-1.4a(2)*. Each violation of this Ordinance shall constitute disorderly conduct. Every person violating this Ordinance, including the owner . . . and the lessee or tenant of an entire building or structure or premise in which part such violation has been committed or shall exist . . . or any other person who knowingly commits, takes part or assists in any such violation . . . shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues.

Question Presented

Whether six unrelated persons living together as a household have a constitutional right to occupy a one family residence in defiance of a Village zoning ordinance which defines its one family zoning district in terms of a family related by blood, adoption or marriage or, in the alternative, not more than two unrelated individuals.

Statement of Case

Belle Terre is an Incorporated Village of the Fourth Class located on the North Shore of Long Island in Suffolk County, New York. The Village consists of approximately 220 homes inhabited by approximately 700 people.

The Building Zone Ordinance of the Village restricts the use of land to single family houses. Family is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Plaintiffs, Edwin and Judith Dickman, are the owners of a house in the Village of Belle Terre. Plaintiffs, Bruce Boraas and Michael Truman, are lessees of the Dickman house. Plaintiff, Anne Parish resides in the house. Three other persons, not plaintiffs in this action also live in the house. All six are students at the State University of New York at Stony Brook. None of the six residents of the Dickman house is related to any of the others by blood, adoption or marriage. Both the University and the Village are located wholly within the Town of Brookhaven (population 250,000) whose zoning would permit plaintiffs occupancy.

On July 19, 1972, the plaintiffs, Edwin and Judith Dickman, were served with a Criminal Summons returnable before the Village Justice on July 28, 1972, charging them with a violation of the one-family Zoning Ordinance. Because the Summons was served without having been preceded by a 48 Hour Notice of Violation from the Village Building Inspector, the Village Counsel temporarily withdrew the Summons on July 28, 1972. This was followed on July 31, 1972, by service upon the plaintiffs, Edwin and Judith Dickman, by the Village Building Inspector of the

48 Hour Order to Correct Violation. On August 2, 1972, the present action was begun by the plaintiffs in the Eastern District Court, for an injunction and a judgment declaring the zoning ordinance unconstitutional. On September 20, 1972, the District Court per Dooling, *D.J.*, denied a motion for a preliminary injunction in a decision upholding the validity of the ordinance because of the state interest in protecting and fostering the traditional family pattern through zoning limiting some areas to single family occupancy. The Plaintiff students appealed the denial of the preliminary injunction to the Second Circuit Court of Appeals, which reversed and remanded. That Court found that the goal of preference for traditional family organization through zoning "fails to fall within the proper exercise of state police power" (476 F.2d at 815). The Court of Appeals found in addition that the distinction between related families and unrelated groups could not be proved to promote traditional physical zoning objectives, such as control of population density, traffic congestion and property values. On remand the District Court entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement. In order to procure finality the Village appealed to the Second Circuit Court of Appeals which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. From this judgment the Village and the individual defendants appeal to this Court.

The Questions Are Substantial

The decision of the Court of Appeals in this case constitutes the most sweeping judicial invasion into local autonomy in land use policy since zoning was first discussed by this Court forty-seven years ago, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Ironically, this has occurred in a case wholly lacking in those overtones of race or class exclusion which have been coming before the lower courts in recent years. E.g., *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968). The practical implications of such judicial intervention have attracted widespread public attention (E.g., New York Times, Feb. 28, 1973, p. 34; New York Times, March 4, 1973, p. 58B) and caused Judge Timbers, in his dissent, to note the "radiations far beyond the immediate controversy. . . ." (476 F.2d at 819).

I

Whether preference for traditional family organization is a legitimate governmental objective per se.

The first substantial legal point presented by the decision below concerns the goals that local zoning power may legitimately aim for. While the Village contends that the family classification is relevant to unchallenged zoning purposes of density control, traffic congestion and property value, to be discussed subsequently, the District Court and the Court of Appeals differed sharply on whether zoning may legitimately have the social purpose of fostering and preferring the traditional family as such. While the District Court sustained the ordinance principally on this

basis, the Court of Appeals stated that "such a goal fails to fall within the proper exercise of state police power" (476 F.2d at 815).

Appellants submit that this *ipse dixit* finds no sanction in the Constitution and is thoroughly inconsistent with our tradition of bounties and protections with which, as Judge Dooling in the District Court put it "the states, and all of them, and the Federal Government alike aggressively surround the traditional family of parents and children, reaching from family court laws, through laws of inheritance to tax law." (Appendix B, p. 74a).

If one of those bounties is the creation of single family zoning districts within large cities and towns or, as here, the incorporation of tiny family villages within larger township units, there is nothing unusual or discriminatory in the existence of the sheltered and tranquil family environment so created. This constitutes a legal benefit and preference for family organization and is justified as one among many applications of state solicitude. Clearly, the solicitude toward the family cannot be construed as hostility towards other land uses. Judge Dooling so concluded in stating: "The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac.2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged." (Appendix B, p. 80a). This conclusion is demonstrably applicable to this case, in which Belle Terre is but a tiny outpost in the Town of Brookhaven (population 250,000) which has several zoning districts, even the

highest of which, as the District Court determined, would permit the students' domestic arrangement (Appendix B, p. 58a).

Judge Dooling recognized that "zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection." (Appendix B, p. 75a). The single zone which the Village constitutes was held proper "in view of its small size and apparent state of development. It is not claimed that the Village was, as it were, gerrymandered into existence so that it could be a single district village." (Appendix B, p. 76a). This accords with all available authority. *Matter of Fox Meadow Estates* v. *Culley*, 233 App. Div. 250, 252 N.Y.S. 178, aff'd 261 N.Y. 506 (1931); *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 147 N.Y.S. 2d 738, modified 1 A.D.2d 1034, 152 N.Y.S. 2d 738, aff'd 2 N.Y. 2d 190 (1957); *Valley View Village* v. *Proffett*, 221 F. 2d 412 (6th Cir. 1955).

The Court of Appeals "universalized" the Belle Terre ordinance instead of accepting it for what it is—a tiny island of one family zoning in an ocean of permissively zoned area. The Court reasoned that if the Belle Terre ordinance were upheld all other communities might adopt similar laws, leaving groups such as Appellees with no place to live. Putting to one side the wholly speculative nature of this supposition, a contrary decision in this case would not justify any such sweeping suppression of unrelated group living arrangements. Belle Terre, because of its small size, is constituted wholly as a one family district. Larger communities, such as the Town of Brookhaven in which Belle Terre is situated, have multi-district zoning comprised of one and two family, multiple dwelling, com-

mercial and industrial. A decision that a municipality may reasonably limit the number of unrelated individuals who may aggregate together under one roof in a one family district does not justify excluding them from other districts not limited to single family occupancy. The line would thus be easy to draw and would not involve the exclusionary consequences envisioned by the Court of Appeals.

II

Whether the classification in terms of traditional families is rationally related to other legitimate governmental interests.

The first point of note is that the Court of Appeals departed from the traditional rational basis test altogether. Without characterizing the students' claimed right as "fundamental", the Court nevertheless took its lead from a recent article (Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1 (1972)) and opted for "a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." (476 F.2d at 814). This alone is a significant shift in doctrine in a major area of constitutional law. That the traditional rational basis test of equal protection is the appropriate one is demonstrated by the recent case of *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973) which also involved the right of unrelated individuals to live together. Although that case struck down a portion

of the Food Stamp Act which denied stamps to households composed of unrelated persons, Defendants-Appellants cite it as a precedent in their favor here because it applies the established rational basis test to a classification impinging on the same type of rights as those asserted by the Students. The actual holding is not adverse to our position because of the differences in purpose between food stamp distribution and zoning. A family classification not rationally related to nutritional needs becomes highly relevant to land use considerations.

Were no distinction to be drawn between a genuinely related family versus unrelated individuals desiring to live together as a sort of commune, the zoning objectives of density control, preservation of neighborhood character, and control of rental values would be frustrated. These objectives form not only a rational basis for zoning but part of its essential reason for being Anderson, American Law of Zoning, Sections 7.01, 7.06, 7.08 et seq.

In the absense of a distinction between blood relatives and others, the Courts have quite properly construed zoning ordinances strictly against the municipality and in favor of the property owner. For example, in New York, although the Appellate Division, Second Department, has held that 23 college students living together did not constitute a family *Schnectady* v. *Alumni Assn.*, 5 A.D. 2d 18, 168 N.Y.S. 2d 754 (1957), the Third Department has held that 60 students living together constituted a family (*Application of Laporte*, 2 A.D. 2d, 710, 152 N.Y.S. 2d 916, Aff'd 2 N.Y. 2d 921 (1956). Other jurisdictions have experienced similar difficulties with open-ended definitions of "family" *Robertson* v. *Western Baptist Hospital*, 267 S.W.

2d 395 (Ky. 1954), (20 nurses sharing one residence held to be a family). Indeed, the unlimited number of strangers who might live together as a "family" under an Illinois ordinance resulted in the Court striking down the ordinance's prohibition on multiple dwelling units within a building. If numerous strangers may live together it is arbitrary to prevent them from living separately, *Harman* v. *City of Peoria*, 373 Ill. 594, 27 N.E. 2d, 525 (1940).

Thus, it may be seen that a municipality's right to regulate boarding house uses and other density problems is meaningless without some restriction on the number of unrelated individuals who may live together in a dwelling. The fact that no numerical limit is imposed upon the number of blood relatives who may constitute a family does not introduce an irrational or discriminatory distinction. The number of children, brothers, uncles, grand-parents or other relatives who may be added to the conventional family unit tends to be self-limiting. This fact, together with a laudable wish not to intrude on a valued social institution accounts for the absence of a numerical limit on conventional family occupancy. No self-limiting factor, no built-in institutional restraint applies to communal living by unrelated individuals. To the contrary, the property owner's profit motive pushes strongly in the other direction.

The privileged legal position of traditional families is well stated in *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908, at 911:

> "But there is a long recognized value in the traditional family relationship which does not attach to the "voluntary family". The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible to sunder. It plays

> a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. A zoning law which divided or totally excluded traditional families would indeed be "suspect". The communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. They are in no way subject to the State's vast body of domestic relations law. They do not have the biological links which characterize most families. Emotional ties between commune members may exist, but this is true of members of many groups. Plaintiffs are unquestionably sincere in seeking to devise and test new life-styles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected but the right to insist that these groups live under the same roof, in any part of the city they choose, is not".

In the case of unrelated groups, greater density (especially of individuals leading separate lives) means separate car ownership, traffic and parking congestion, and other problems of intensity of land use. As the *Palo Alto Tenants Union* case emphasized, voluntary association of persons with no binding ties constitute a more potentially transient population. (Note that 4 of the 6 present occupants of the Dickman houses are not on the lease) similar to hotel, motel and boarding house uses—all of which affects the residential integrity of the area, and consequently, property values. *Wulfsohn* v. *Burden*, 241 N.Y. 288 (1925); Anderson,

American Law of Zoning, Sec. 7.25. Consequently, the concern of the Village expressed in this Ordinance cannot be dismissed as irrational or unrelated to legitimate zoning policies.

To say, as the Court of Appeals did, that the problems associated with unrelated group occupancy are "rank speculation, unsupported either by evidence or by facts that could be judicially noticed" (476 F.2d at 816) departs radically from the presumption of validity traditionally associated with the rational basis test used with the equal protection clause. The question before the Court is not whether the lawmakers can prove the factual basis underlying the statute; but whether the challenger can demonstrate "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Accord, *San Antonio Independent School Dist.* v. *Rodriguez*, 36 L. Ed.2d 16 (1973).

CONCLUSION

The power of a municipality to distinguish between family living and other types of multiple occupancy by unrelated individuals must be acknowledged if the well established zoning distinction between one family and multiple dwelling districts is to remain viable. The decision below implicitly challenges the right of a locality to continue to make this distinction. The impact is obvious and far reaching. The decision necessitates an inquiry into basic questions of what the legtimate purposes of zoning may include and the existence and scope of the rights of domestic association

claimed by Appellees—as well as the appropriate criteria in an equal protection analysis. Because of the actual consequences for large numbers of individuals and localities and the disputed constitutional issues Appellants respectfully request that probable jurisdiction be noted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

BRUCE BORAAS et al.,

Plaintiffs-Appellants,

v.

The VILLAGE OF BELLE TERRE, an incorporated municipality, et al.,

Defendants-Appellees.

No. 372, Docket 72-2040

United States Court of Appeals,
Second Circuit.

Argued Oct. 19, 1972.

Decided Feb. 27, 1973.

Rehearing En Banc

Denied March 16, 1973

Opinion Dissenting From Denial of Rehearing En Banc April 5, 1973.

Reversed and remanded.

Timbers, Circuit Judge, filed dissenting opinion.

From denial of rehearing en banc, Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers dissented; Circuit Judge Timbers filed opinion dissenting from denial of rehearing en banc.

Before MANSFIELD, OAKES and TIMBERS, Circuit Judges.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

MANSFIELD, Circuit Judge:

At issue upon this appeal is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence in an area zoned for "one-family" occupancy. We held that since the discriminatory classification is unsupported by any rational basis consistent with permissible zoning law objectives, it transgresses the Equal Protection Clause. The district court's decision denying preliminary injunctive relief against enforcement of the ordinance is reversed.

Plaintiffs Edwin and Judith Dickman, owners of a house in Belle Terre, a suburban municipality with approximately 700 residents occupying some 220 homes in Suffolk County, New York, have rented their six-bedroom, single-family residence for occupancy to plaintiffs Bruce Boraas, Anne Parish and Michael Truman, all students at the State University of New York at Stony Brook, located seven or eight miles away, and to three other students attending the same university who are not parties to the instant action. The premises were originally leased on or about December 31, 1971, by plaintiff Truman as lessee for a term ending May 31, 1973, at a monthly rental of $500. Plaintiff Boraas later became a co-signer of the lease on the same terms.

None of the six student occupants is related. Each occupies one of the six bedrooms and pays a portion of the rent. The six are organized and function as a single housekeep-

ing unit insofar as they use the common cooking facility, dine together and share housekeeping, "yard" chores, and a "house" checking account from which disbursements for necessary household expenses are made. It is conceded that all of the occupants have behaved in a responsible manner, and no immoral conduct on their part is suggested. Four of them are pursuing graduate studies in sociology at Stony Brook.

Plaintiffs assert that before leasing the Belle Terre residence from the Dickmans they looked extensively for alternatives to traditional dormitory living, which admittedly are available. Conventional apartment rentals, where available, however, were found to be beyond their means and a cooperative housing arrangement was considered by them to be pleasant, convenient, promotive of scholarly exchange, and within their pocketbooks.

The village of Belle Terre, which consists of approximately 220 homes, is zoned exclusively for residence in one-family dwellings.[1] A "family" is defined as:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by

[1] A one-family dwelling is defined as:

> "A detached house consisting of or intended to be occupied as a resdence by one family only, as family is hereafter defined. In no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family dwelling." Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.34a (1971).

> blood, adoption, or marriage shall be deemed to constitute a family." The Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.35a (June 8, 1970).

To enforce the zoning code the ordinance further provides:

> "Each violation of this ordinance shall constitute disorderly conduct. . . . [Persons] shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues." Building Zone Ordinance of the Village of Belle Terre, Art. VIII, Part 4, § M-1.4a(2) (Oct. 17, 1971).

On June 8, 1972, Boraas and Truman were denied residents' beach passes because the ordinance allegedly considered them "illegal residents."[2] On July 19, 1972, the Dickmans, the owners-lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village Code required a 48-hour notice of violation, which had not been complied with, the summons was withdrawn. On July 31, 1972, the Dickmans were served with the required "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972.

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[2] Plaintiffs assert that this was the explanation given by one of the individual defendants, Francis R. Stolz, a Trustee of the Village. Other named defendants are James Philbin, Mayor of the Village, Robert Doerr, Deputy Mayor and Trustee, Vincent Bove, Trustee, and Vincent Karwowski, Trustee.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

On August 2, 1972, plaintiffs commenced an action in the district court under the federal Rights Act of 1871, 42 U.S.C. § 1983, against appellees, who are the Mayor and Trustees of Belle Terre, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption, or marriage." [3] Jurisdiction was ground on 28 U.S.C. §§ 1331(a), 1343, and 2201. Pending a hearing on the constitutional issues, Judge Dooling issued a temporary restraining order.

Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 issued a 40-page decision and order denying the motion for a preliminary injunction and upholding the validity of the ordinance. A temporary restraining order was continued for five days to enable plaintiffs to seek a stay pending appeal, which was granted by this Court on September 27, and thereafter extended to the date of our decision and mandate.

In his carefully considered opinion Judge Dooling decided that he was not precluded from reaching the merits by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d

[3] Specifically, the complaint allaged that the ordinance denied the plaintiffs' equal protection of the law, violated their right of association as secured by the First and Fourteenth Amendments, intruded on their constitutionally protected right of privacy, and contravened their right to travel. On appeal, the primary reliance has been on the equal protection claim at least insofar as the ordinance allegedly impinged unequally on the other specified constitutional rights.

669 (1971), its brethren, or by the anti-injunction statute, 28 U.S.C. § 2283 (1965), and that abstention was not appropriate for the reason that the New York decisional law clearly indicated that the zoning ordinance would be deemed an exercise of power granted by New York's enabling legislation, N.Y. Village Law §§ 175, 177. See, e. g., City of Schenectady v. Alumni Association of Union Chapter, 5 A.D.2d 14, 168 N.Y.S. 2d 754 (3d Dept. 1957). Recognizing that plaintiffs had the "unquestionable right to live together in student groupings," free from unwarranted public intrusions, just as traditional families had the right to live in areas restricted to one-family dwellings, he summarized the issue before the court as follows:

> "The question ultimately posed is whether it is lawful to have a one-family dwelling zone district which excludes equally small household groups who impose no greater burdens of use on the land, the building or the surrounding than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children." (A. 73a).

Judge Dooling concluded that the exclusionary classification could not be upheld on traditional grounds supporting zoning regulations as a valid exercise of state police power, see Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), because it did not promote "such familiar zoning objectives as safety, adequate light and air, preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewer-

age, school, park and other public services." (A. 77a). However, he decided that the ordinance represented a lawful exercise of a "legally protectable affirmative interest" in the family made up of married parents and children, i. e., the traditional "marriage-and-blood-related" families of the type presently occupying Belle Terre. Holding that the interest of such traditional families in maintaining uses of the same character in the community is a "proper zoning consideration," he described "[s]uch zoning [as] simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws." (A. 77a).

In reaching its decision the district court gave weight to the smallness of the Belle Terre community, the absence of similar restrictive or exclusionary classifications in some nearby communities, and the existence of dormitory facilities at Stony Brook itself. Appellants here seek reversal on the ground that the Belle Terre zoning ordinance impinges upon their constitutional rights of privacy and association.

Procedural Questions

[1] Although we are faced at the outset with a number of procedural questions, we agree with the district court that none of them precludes consideration of the merits. Since the Belle Terre ordinance was not of state-wide applicability, the statutory requirement for consideration by a three-judge court, 28 U.S.C. § 2281, has no application.

> "The court has consistently construed the section [2281] as authorizing a three-judge court not

merely because a state statute is involved but only when a *state statute of general and statewide application* is sought to be enjoined." Moody v. Flowers, 387 U.S. 97, 101, 87 S.Ct. 1544, 1548, 18 L.Ed.2d 643 (1967); see Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585, 72 L. Ed. 990 (1928). (Emphasis supplied.)

[2] We further conclude that Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its brethren,[4] which held that in the absence of extraordinary circumstances threatening irreparable injury federal injunctive or declaratory relief should not issue when a prosecution is pending in a state court against the federal plaintiff, do not preclude federal equitable intervention, at least under the facts of this case. See Thoms v. Heffernan, No. 72-1013, 473 F.2d 478 (2d Cir. 1973); Note, Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Column.L.Rev. 874; Hull v. Petrillo, 439 F.2d 1184, 1186 n.1 (2d Cir. 1971). Cf. Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). As of August 2, 1972, the date of the initiation of the federal suit, no state case was pending; in fact no liability attached until August 3, 1972.

[3] We are also persuaded that a justiciable controversy is presented. Neither *Younger*, nor Boyle v. Landry, 401

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[4] Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971).

U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971), precludes a showing of such a controversy. See Thoms v. Heffernan, No. 72-1013, 473 F.2d 478 (2d Cir. 1973); Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). Here the denial of the beach passes and the service of the notice of July 28 overcome any justiciability barrier.

[4, 5] It is further settled that the anti-injunction statute, 28 U.S.C. § 2283[5] does not bar enjoining *future* state court proceedings, Dombrowski v. Pfister, 380 U.S. 479, 484 n.2, 85 S.Ct. 1116, 14 L.Ed.2d 22, (1965); see Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and that 42 U.S.C. § 1983 constitutes a congressionally carved out exception to the anti-injunction statute. Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

[6] Finally, we agree with Judge Dooling that absention is not warranted. We are not here confronted with a situation where state court resolution of an unclear state statute might obviate the necessity to decide federal constitutional questions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). It is unlikely that New York courts would find Belle Terre's zoning ordinance *ultra vires* the state enabling legislation, N.Y. Village Law, §§ 175, 177 (McKinney 1966), since

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[5] The "Anti-Injunction" statute provides:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1965).

similar zoning classifications grounded on the concept of "natural families" have been sustained. See, e.g., City of Schenectady v. Alumni Association of Union Chapter, 5 A.D.2d 14, 168 N.Y.S.2d 754 (3d Dept. 1957). Moreover, as Judge Dooling noted:

> "In the present case a state court decision holding that the ordinance, construed as the village has construed it, was beyond the authority granted to the village by the New York Village Law, could apparently be based only on the argument that to hold otherwise would impose on . . . the Village Law an unconstitutional interpretation. Any unresolved question of the state law detectable here is, therefore, the federal question differently stated." Cf. Wisconsin v. Constantineau, 400 U.S. 433, 438-439, 91 S. Ct. 507, 27 L.Ed.2d 515 (1971).

The Merits

Turning to the merits, it is undisputed that the Belle Terre zoning ordinance restricts appellants in the exercise of their rights with respect to the use of land in the Village and that it is discriminatory and unequal to the extent that, while traditional families of more than two members may occupy a one-family dwelling, groups of more than two unrelated individuals (sometimes described as "voluntary" families) are prohibited from doing so. The basic issue before us is whether this unequal legislative classification violates the Equal Protection Clause.

[7] In approaching that issue we start on the premise that almost every local zoning ordinance represents a re-

striction upon citizens' freedom of action in the exercise of otherwise lawful and constitutional rights with respect to the use of their land, whether it be in the operation of a business or the construction of a home. Where such regulations represent a valid exercise of delegated state police power and are designed to promote or protect the public health, safety or welfare, the individual's right must give way to the particular concern of the community, Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926); Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927); Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); cf. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

[8-11] The right of an individual or of a group, related or otherwise, to live together does not necessarily guarantee complete freedom as to the location, construction, or living conditions, without regard to reasonably based zoning laws. In enacting zoning legislation the local authorities are vested with broad discretion. Ordinarily a court will intervene to declare a zoning ordinance to be a denial of due process only where it cannot be supported by a substantial public interest. Traditionally it may be justified by showing that it is related to such matters as safety, population density, adequacy of light and air, noise and necessity for traffic control, transportation, sewerage, school, park and other public services. More recently, promotion of the aesthetic aspects of a town has been upheld as a legitimate zoning objective, e.g., United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

From the very outset of its consideration of the constitutionality of local zoning laws, which were then attacked under the Due Process Clause, the Supreme Court laid down a basic principle:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928).

[12] To the requirement that zoning laws satisfy due process, as thus enunciated by *Euclid* and its brethren, there must be added the important condition that they not discriminate in violation of the Equal Protection Clause. While some inequalities may be tolerated, Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 90 L.Ed. 563 (1955), a law which might otherwise be upheld as a valid exercise of police power will be struck down where it classifies on the basis of impermissible criteria, such as race. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); Kennedy Park Homes Association v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971).

Turning to the present case, appellants urge that since the Belle Terre ordinance impinges upon constitutionally protected rights and interests characterized by them as "fundamental," i.e., their rights of privacy, of association

and of travel, as well as their freedom to live with whom they please, cf. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the challenged legislation must be struck down for the reason that it is not shown to be supportable by a "compelling state interest." See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Appellees, on the other hand, argue that if, upon judicial hypothesis, any state of facts might be conceived of which would indicate a rational zoning basis for the ordinance, it must be sustained. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), 31 S. Ct. 337, 55 L.Ed. 369; McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). They suggest that since the ordinance might conceivably be justified as a measure designed to curb population density and excessive rental costs, or to preserve the traditional family character of the neighborhood, it must be upheld.

With respect to appellants' contention that the rights invoked by them should be classified as "fundamental," we note that the interests thus identified by the Supreme Court have been few in numbers. They include the right to travel, Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969), the right to vote, Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), and the right to the essential facilities for prosecution of a criminal appeal, Griffin v. Illinois, 351 U.S., 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Despite vigor-

ous efforts to extend the characterization into other fields, including exclusionary zoning,[6] the list of so-called "fundamental" rights has not been expanded. At its last term the Supreme Court declined to classify as "fundamental" the right to housing, Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), and reaffirmed its similar views with respect to welfare payments, Jefferson v. Hackney, 406 U.S. 535, 546, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Unquestionably the rights claimed by appellants are important. Certainly they are more personal and basic in nature than those of commercial interests of the type under consideration in *Lindsley, supra*, and *McGowan, supra*. On the other hand, this case does not present us with discrimination against racial minorities or the poor. Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge, 81 Yale L.J. 61 (1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). Nor does the present case fit snugly into any of the other categories recognized as requiring application of the compelling state interest test. Despite the incidental effects of the Belle Terre ordinance, we are not here dealing with a "suspect" classification such as race,

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[6] Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge, 81 Yale L.J. 61 (1971); Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan.L.Rev. 767 (1969); Comment, All In The "Family": Legal Problems of Communes, 7 Harv.Civ.Rights —Civ.Lib.L.Rev. 393 (1972).

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), or alienage, Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), or with a law directed against a right of association sought as a means of political expression or action, e. g., NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1969); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), or as a means of obtaining access to the courts, NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[13-16] It may be that the underlying purpose of the Belle Terre statute is to regulate the intimate moral behavior of its residents within their "zone of privacy," Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and that its effect has been to curb the right to travel of those who wish to live in Belle Terre. Shapiro v. Thompson, 394 U.S. 617, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Belle Terre, however, claims that these are not purposes of its zoning law. Fortunately we do not have to decide whether there has been an infringement of the right of privacy or travel because we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny permitted by the *Lindsley-McGowan* formula. Faced recently with the issue under similar circumstances the Supreme Court appears to have moved from this rigid dichotomy, sometimes described as a "two-tiered"

formula,[7] toward a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute. Eisenstadt v. Baird, 405 U.S. 438, 446-455, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), see James v. Strange, 407 U.S. 128, 140-141, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); Jackson v. Indiana, 406 U.S. 715, 723-730, 92 S.Ct. 1845, 32 L.Ed.2d 285 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-176, 92 S.Ct. 1396, 31 L.Ed.2d 768 (1972). This approach is suggested by language of Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920), and of a distinguished commentary, e.g., Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal.L.Rev. 341, 344-353, 365-368 (1949). If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

[7] See Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev 1, 10-20 (1972).

> stanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.
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> "The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not." Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

In thus being required to focus on the actual rationality of the legislative means under attack, we are asked to do what courts are historically suited to do—apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification.[8] This more realistic judicial

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[8] We disagree with our Brother Timbers' interpretation of our decision as requiring the court to apply a flexible standard based upon balancing of the importance of the respective conflicting governmental and private interests affected by the legislation under review. We believe simply that the court is required to determine whether the legislative classification *in fact* (rather than hypothetically) has a substantial relationship to a lawful objective. That determination of necessity requires the court to consider evidence of the nature of the classification under attack, the rights adversely affected and the governmental interest in support of it.

We agree with Judge Timbers' conclusion that in determining whether legislation under review denies equal protection "grossly overinclusive or underinclusive classifications should not be readily tolerated." However, for reasons stated below (at 2010-2014) we conclude that even assuming *arguendo* that the Belle Terre ordinance had a legitimate objective, the means adopted cannot be justified under this standard.

scrutiny in cases in which the compelling state interest test is not invoked serves to render the Equal Protection Clause effective rather to permit all but egregious inequalities to go unchecked, as was sometimes the case under the minimal scrutiny test. This approach is particularly appropriate in cases of the present type, where individual human rights of groups as opposed to business regulations are involved. See United States v. Carolene Products Co., 304 U.S. 144, 152-153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); Tussman & tenBroek, *supra* at 373.

[17] Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely the interest of the local community in the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966); cf. Moreno

v. U. S. Dept. of Agriculture, 345 F.Supp. 310 (D.D.C.) (three-judge court) (per McGowan, Cir. J.), prob. jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.E.2d 485 (1972).

[18] The effect of the Belle Terre ordinance would be to exclude from the community, without any rational basis, unmarried groups seeking to live together, whether they be three college students, three single nurses, three priests, or three single judges. Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community "Admissions Committee." While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public.

Even assuming *arguendo* that a social predilection in the form of entrenched traditional family units constituted a valid zoning objective, we fail to find a shred of rational support for the means used here to achieve that end. It is not suggested that appellants or unrelated groups functioning as a single housekeeping unit, endanger the health, safety, morals or welfare of existing residents of the community. The most that can be said is that they differ from existing residents solely because of lack of blood or marriage ties.

[19] Appellees urge that regardless whether social preferences may or may not form a valid basis for upholding the ordinance, it should nevertheless be sustained on the ground that it has a rational basis in traditionally recognized zoning objectives. It is suggested, for instance, that the ordinance is justified as a means of controlling population density. This contention is based on the assumption that the number of related persons in the conventional family unit (husband, wife, brothers, sisters, children, nephews, uncles, grandparents) tends to be "self-limiting," whereas in the absence of a regulation limiting the number of unrelated occupants, the "voluntary" family can be limitless in size. Another argument advanced by appellees is that the ordinance might avoid escalation of rental rates, which would price traditional families out of the market, since it is possible that unrelated groups would be willing to pay higher rentals than would consanguineal families. We are further asked to speculate that "voluntary" families would pose greater parking, traffic and noise problems than would traditional families and that there would be a greater degree of transiency on the part of the former than the latter, thus weakening the stability of the community.

If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support. To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or

traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed. We are here constrained to adhere to Judge Dooling's observation that "Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives as safety, adequate light and air, preservation of the lands from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services."

> "In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. An ordinance requiring relationship by blood, marriage or adoption could be regarded as tending to limit the intensity of land use. And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.
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> "But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the

size of family units." City of Des Plaines v. Trottner, 34 Ill.2d 432, 434, 216 N.E.2d 116, 119 (1966) (per Justice Schaefer).

Even if the Belle Terre ordinance could conceivably have a legitimate zoning objective, the classification established, may well be vulnerable as too sweeping, excessive and over-inclusive. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); cf. Developments in the Law—Equal Protection, 82 Harv. L.Rev. 1065, 1082-1087 (1969). For instance, if it were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice. Furthermore, such an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit. Public and private nuisance laws should provide an adequate remedy to curb noise or other forms of pollution on the part of occupants of a dwelling, regardless of their relationship to each other.

If the objective of the ordinance were to avoid rent inflation, the simple remedy would be adoption of rent controls rather than the exclusive of a class of people from the community. Lastly, disregarding the absence of evidence to support the suggestion that the ordinance might constitute

a means of controlling traffic, parking or noise, there exist a wide variety of local legislative enactments by which these objectives could be accomplished without impinging upon the rights of privacy and association of unrelated persons. If a problem of excessive automobiles existed, it could be met simply by restricting the number of cars per dwelling unit, regardless of the relationship of its occupants.

[20, 21] Nor are we persuaded to sustain the Belle Terre ordinance by the fact that dormitory housing is available to appellants at Stony Brook or one-family housing available in other nearby communities which have not enacted exclusionary zoning of the type here under attack. The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled, subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F. 2d 807 (1st Cir. 1970), affirming 312 F.Supp. 692 (D.R.I.1970). If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have.[9] The

[9] See, e.g., Building Zone Ordinance of Village of Babylon, Art. I, § 100(28); Building Zone Ordinance of Village of Sag Harbor, Art. II, § 1(d); Ordinances of the Village of Bellport, Ch. 10, Art. II, § 206.1; Zoning Ordinance, General Regulations of Town of East Hampton, § 309.5; Unified Code of Ordinances, The Village of Oldfield, Art. VII, Ch. 7, Zoning, Part. 7.2.

availability of housing and other community, therefore, does not constitute a defense. Carried to its logical conclusion such an argument might, after all local communities in an entire area had adopted unjustifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states.

Lastly we note that in most cases similar zoning classifications have been found invalid. See City of Des Plaines v. Trottner, 34 Ill2d 432, 216 N.E.2d 116 (1966); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A. 2d 513 (1971). In an analogous context a three-judge court has struck down a legislative classification which limited eligibility for food stamps to "related" individuals living as one economic unit sharing common cooking facilities and excluded groups of unrelated individuals similar to appellants here. Moreno v. United States. Dept. Agriculture, 345 F.Supp. 310 (D.D.C.), prob jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.Ed.2d 485 (1972). We find Palo Alto Tenants Union v. Morgan, 321 F.Supp. 908 (N.D.Cal.1970), relied on by appellees, to be unpersuasive. Although the court there upheld a similarly defined "single family" zoning ordinance under restrained equal protection scrutiny, it also found, unlike the district court here, that the ordinance was rationally related to population density control, traffic control and maintenance of lower rental rates.

CONCLUSION

[22] The discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives. Since appellants have shown a strong likelihood of success on the merits and the balance of hardships tips decidedly in their favor, the prerequisites for preliminary injunctive relief have been established. Checker Motors Corp. v. Chrysler Motors Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969).

Accordingly the order of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

TIMBERS, Circuit Judge (dissenting):

The Village of Belle Terre, a community of 700 people, has enacted a "one-family" zoning ordinance similar to those in effect in thousands of communities throughout the Nation. Six unmarried students—three males and three females—at the State University of New York at Stony Brook, claiming that they constitute "one-family", have leased a house in Belle Terre for the purpose of living there together. The Village says its one-family ordinance prohibits such a group living there. The students, in their civil rights action brought in the district court below, challenge the constitutionality of the ordinance. After a hearing in the district court, Judge Dooling, in a most thoughtful and perceptive opinion, — F.Supp. — (E.D.N.Y. 1972), upheld

the validity of the ordinance and denied a preliminary injunction against its enforcement. The majority in our Court today reverses the district court and strikes down the Village's zoning ordinance on the ground that it violates the equal protection clause of the United States Constitution. I disagree.

First, while I recognize that the Supreme Court appears to be casting aside the rigid old equal protection-new equal protection dichotomy, I believe that the majority in our Court incorrectly perceives the essence of the new standard being developed. Since our decision will have radiations far beyond the immediate controversy, I feel compelled to state my understanding of the Supreme Court's latest equal protection decisions and the new standard of judicial review that they require.

Secondly, I disagree with the majority on the merits of the instant controversy. In my view since the Belle Terre zoning ordinance bears a significant relationship to the traditionally recognized zoning objectives asserted by appellees, it satisfies the new equal protection standard.

I.

In the century that has passed since the equal protection clause became part of our Constitution, two well-defined equal protection standards have been established: the "minimal scrutiny" standard and the "strict scrutiny" standard.

A good definition of the "minimal scrutiny" standard or test was articulated by Chief Justice Warren in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> "[The equal protection clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

This deferential test, also known as the "old equal protection", was utilized most often where economic or social legislation was being challenged. See, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

The "strict scrutiny" test involved a more intense and interest-balancing review of legislative means and ends. It required that the governmental purpose for legislation be "compelling" and that the intrusion upon individual rights caused by a legislative classification be "necessary" to the effectuation of this "compelling" purpose. See Shapiro v. Thompson, 394 U.S. 618 (1969). This interventionist test, also known as the "new equal protection", was applied where a classification provided for differential treatment on the basis of race, Loving v. Virginia, 388 U.S. 1 (1967), or where a neutral classification in fact adversely affected the fundamental rights of a disadvantaged group. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Griffin v. Illinois, 351 U.S. 12 (1956) (right to an effective criminal appeal); Shapiro v. Thompson, *supra* (right of interstate travel).

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The majority here asserts that certain recent decisions of the Supreme Court[1] indicate that a third standard of review—an equal protection standard of intermediate scrutiny—is in the process of evolution. This standard is described by the majority as "a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." The test proposed by the majority is that "[i]f the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld." The majority further states that under the new test courts are "asked to do what courts are historically suited to do—apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification." I believe that the intensity and focus of judicial review required by the decisions cited by the majority differs substantially from the intensity and

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[1] The majority relies primarily upon five decisions to support its formulation of a new rationality standard: James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). Additional decisions might be cited to indicate that the Court recently may have been developing a third standard of review: Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). See generally Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for A New Equal Protection, 86 Harv. L. Rev. 1 (1972).

focus of the test proposed by the majority and applied by the majority to the present controversy.

James v. Strange, 407 U.S. 128 (1972), a unanimous decision, probably is the best example of the Court's new policy of judicial intervention without "strict scrutiny". That decision held unconstitutional a Kansas statute for recoupment of legal defense fees expended for indigent defendants. What the Court found offensive about the statute was that a debtor in a recoupment action could not avail himself of a number of protective exemptions—including some restrictions on wage garnishment—afforded to other civil judgment debtors. It held that the distinction between these debtors and other civil judgment debtors with regard to the exemptions violated the equal protection clause recause it was not based on "some rationality".

In Jackson v. Indiana, 406 U.S. 715 (1972), the Court held that the state's provisions for pretrial commitment of mentally incompetent criminal defendants violated the equal protection clause. A comparison of the commitment laws applicable to a criminal defendant with those governing commitment of persons not charged with offenses disclosed that criminal defendants were subject to more lenient commitment standards and to a more stringent release standard. Accepting as legitimate the proffered state objective in committing criminal defendants, the Court decided that the difference between commitment procedures was not supported by any rational basis related to this objective.

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), invalidated a statute which discriminated between

legitimate children and dependent, unacknowledged legitimates in awarding workmen's compensation benefits for the death of a common father. The Court held that the discrimination against illegitimates bore "no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." 406 U.S. at 175.

The two decisions chiefly relied upon by the majority here, Eisenstadt v. Baird, 405 U.S. 438 (1972), and Reed v. Reed, 404 U.S. 71 (1971), strike me as not truly illustrative of the intensity and focus of review associated with the evolving equal protection standard. In both *Baird* and *Reed*, the Court did specify that the test being applied was a means-scrutiny test; whether the means actually were rationally related to a valid public purpose. But the actual scrutiny engaged in by the Court in each case seems more intense than required under the means-scrutiny test as defined.

In *Reed*, the Court held unconstitutional an Idaho probate provision which gave men a mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate. Chief Justice Burger found "some legitimacy" in the state's proffered objective to simplify probate proceedings. Yet in testing the means solely as related to that aim the Court held that the sex classification was "arbitrary". It seems clear that the means did contribute substantially to the state's purpose, and that the rationality test was met. The more intense review engaged in by the Court, more charac-

teristic of the strict scrutiny test than of the new rationality test, apparently reflected an unexpressed special suspicion of sex classifications.

In *Baird*, the Court struck down Massachusetts, ban on the distribution of contraceptives to unmarried persons. The Court reached this result, however, by scrutinizing the legislation far more vigorously than it would have under the means-scrutiny standard. It rejected, as appropriate measures of the rationality of the means, two of the purposes in fact asserted by the state. The only purpose it found credible was a ban on contraceptives as such. It then stated that a distinction between married and unmarried persons was not rationally related to this objective. The Court appears to have reached a judgment as to the legitimacy of the ends by measuring their value against the individual interests affected. Since the interests involved were closed related to those protected in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court was justified in subjecting the statute to intense scrutiny.

The *James*, *Jackson* and *Weber* decisions clearly indicate that the Court is not content with the two-tier equal protection doctrine and they may well presage a new equal protection standard.[2] Such standard would require modest intervention by a court to assure rationality of legislative means but without restricting legislative prerogatives re-

[2] Four decisions rendered by the Court last term indicate that it is not yet ready to abandon the "old equal protection" standard. Jefferson v. Hackney, 406 U.S. 435 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Schill v. Knebel, 404 U.S. 357 (1971); Richardson v. Belcher, 404 U.S. 78 (1971).

garding ends. Unlike the "strict scrutiny" test, the importance of the governmental interests apparently would not be weighed against the importance of the private interests impaired by the legislation. Courts would not defer to a broad range of imaginable legislative purposes, but if the ends proffered by the state were legitimate, and no right or value which has clear support in constitutional text and history were adversely affected, conflicting values would not be required to be weighed. The inquiry thus would be scrupulously focused on means rather than ends.

The majority here states that "the nature of the right affected" should in part determine the rationality of the means. This indicates that the more "valuable" the right affected, the more intense should be the scrutiny and the more rational must be the means to achieve the objective. I do not find any support for this principle in the Supreme Court cases. In each of the decisions, except *Reed* and *Baird*, the intensity of review was of the same degree although the interests affected were different. A "sliding scale" approach may be appropriate in some contexts, but it seems to me to be inappropriate here. A court should not be required to attempt the impossible task of first assessing the precise value of a right or interest[3] and then increasing or decreasing the intensity of its scrutiny ac-

[3] The difficulty in judging the relative value of an interest is illustrated by the Court's hesitancy in expanding the list of "fundamental interests". See, e. g., Lindsey v. Normet, 405 U.S. 56 (1972) (refusal to find housing a fundamental interest). Indeed, the Court's use of the new means-scrutiny test may be viewed as a technique to avoid the troublesome value judgments required to identify new fundamental interests.

cordingly. This approach would confer upon a judge wide discretion to overturn state and local legislation based largely on his own estimate of the value of competing interests—a highly abstract and individualistic determination.

The recent Supreme Court decisions, in my view, require a judge to make only the narrow value judgments needed in evaluating means. A legislative classification must contribute substantially to the achievement of the state's purpose. It must "rest on a ground of difference having a fair and substantial relation to the object of the legislation." Reed v. Reed, *supra*, 404 U.S. at 76. This would indicate that grossly overinclusive or underinclusive classifications should not be readily tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends.

II.

The Belle Terre ordinance clearly was not devised, nor has it been enforced, so as to discriminate against any group because of its racial, religious, or political characteristics. Reitman v. Mulkey, 387 U.S. 369 (1967). It does not operate to exclude the indigent from the Village. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2 Cir. 1968). Appellants have not shown infringement of a constitutional right to freedom of associa-

tion, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), or a right of privacy. Griswold v. Connecticut, 381 U.S. 479 (1965). While appellants' rights to live together under the same roof free from the intrusion of government are said to be important, in my view such rights do not rise to the status of "fundamental interests". In short, the "strict scrutiny" standards should not be applied to test the validity of the ordinance.

The majority believes that the new rationality test should be applied to zoning ordinances such as the Belle Terre ordinance. To me, it is not clear, however, that the Supreme Court is prepared to apply this invigorated rational basis for review to traditional "hands-off" areas of legislative activity. And I have my doubts that we should do so under our own steam. During this last term, the Supreme Court continued its reluctance to explore the welfare area when it found minimal rationality after examining legislation which discriminated in the allocation of welfare funds. Jefferson v. Hackmen, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971). See also Dandridge v. Williams, 397 U.S. 471 (1970). In the past, zoning has been another area which the Court traditionally has declined to explore. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). I therefore am more disinclined than is the majority to apply an intensified means-scrutiny test to this unchartered area of the law.

For discussion purposes, however, I shall assume arguendo that the new standard of review should be applied to the Belle Terre ordinance.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The Village of Belle Terre asserts that the primary purpose of its zoning ordinance is to maintain the one-family residential character of the Village for the welfare of its residents. The majority holds that this is not a valid zoning objective and, further, that the ordinance is not a rational means of achieving that objective. While I find it unnecessary to decide this difficult issue, because the ordinance is rationally related to other well-accepted zoning objectives, the majority's treatment of the subject deserves some discussion.

I believe that under the circumstances here the maintenance of the traditional family character of the Village arguably is a legitimate objective. It may be doubtful whether a local government in preplanning the development of a community could set aside an area solely for single-family dwellings with "family" defined as persons related by consanguinity or legal affinity, or as not more than two unrelated persons. But that is not the case here. The Belle Terre ordinance apparently was enacted for the purpose of zoning for a particular neighborhood character in a community that had always been of that character. The development decision was made over a period of time by the families moving into the Village. The zoning ordinance therefore merely reinforced the sum of many individual choices. See Mandelker, Managing Our Urban Environment 707 (2d ed. 1971).

It is significant also that appellants have available to them similar housing in nearby areas. In assessing the legitimacy of a use limitation upon a particular area, a

court should not ignore a relevant, larger pattern of development. As Judge Dooling stated below:

> "The safeguard against mistaking the effect of a particular ordinance is to see it in its total setting, recognizing that its effect, and, therefore, its validity, may be influenced by the way in which neighboring communities are zoned." — F.Supp. at —.

If the zoning ordinance of a small community is viewed from this broader perspective, its maintenance of a particular neighborhood character may not be seen as an expression of a parochial and exclusionist attitude, but instead as the proper use of the general welfare power to establish one segment of a beneficial larger scheme. A look at the entire Brookhaven area, which provides for varying uses and activities, indicates that Belle Terre's ordinance was a proper exercise of the general welfare power.

Certainly the ordinance is rationally related to this objective. The Village reasonably determined that two unrelated persons living in the same household would not substantially change the character of the neighborhood. Whether the limit should have been three or four unrelated persons, is a matter on which the Village is entitled to some flexibility. The limitation clearly contributes to the objective of preserving a family neighborhood.

In addition to the objective of preserving the traditional family character of the neighborhood, the Village has specified several other purposes of the ordinance: (1) to control population density; (2) to avoid escalation of rental rates; and (3) to prevent parking, traffic and noise prob-

lems. These purposes admittedly are not the primary purposes of the ordinance, but I believe that our inquiry should not be limited to its primary purposes. Subsidiary purposes also may support the rationality of a means.

Judge Dooling observed that the ordinance "might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives" as those noted above. He did not decide whether the ordinance bore a significant relationship to these objectives. In my view, the ordinance is rationally related to each of these ends. I am reinforced in this view by the decision in Palo Alto Tenants Union v. Morgan, 321 F.Supp. 908 (N.D. Cal. 1970), which upheld a zoning ordinance almost identical to the Belle Terre ordinance.[4]

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[4] In *Palo Alto*, the court upheld a zoning law which maintained a "single family residential" neighborhood. "Single family" was defined as persons related by blood or law, or a group not exceeding four persons living as a single housekeeping unit. The law was challenged by a group of more than four unrelated persons on the ground that it violated their rights of association and privacy. Applying the restrained "minimal scrutiny" test, the court held that the classification was rationally related to control of population density, avoidance of rent inflation, and prevention of parking, traffic, and noise problems.

The cases relied upon by appellant, City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966), and Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A. 2d 513 (N.J. Super. 1971), are not persuasive. In *City of Des Plaines* the court never reached the equal protection issue because it decided that the zoning law was ultra vires. In *Kirsch Holding Co.*, the ordinance was declared unconstitutional after the court found that its objective was to prevent obnoxious behavior by persons renting during a particular season. The court held that the ordinance limiting the area to "families" was not rationally related to this objective.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The ordinance here involved obviously provides some controls over density by limiting the number of unrelated persons who may live in a single dwelling. It is argued, however, that the restriction is arbitrary because no corresponding limit is placed on the number of related persons living in a single dwelling. But traditional families do tend to be self-limiting, as the average size of a Belle Terre family (3 persons) demonstrates. Moreover, the Village has an interest in preserving the integrity of the biological or legal family and any discrimination against a large family might run afoul of the Constitution. Cf. Griswold v. Connecticut, *supra*. In short, while the ordinance is not perfectly efficient, it is highly effective, given the realities of the situation. While there may be other, and perhaps more effective, means of curbing population density, the Village should be permitted to select any means that substantially further the legislative purpose. The ordinance in question clearly does so. The majority's observation that other methods of density control are available which are less intrusive upon appellants' rights strikes me as reminiscent of the "strict scrutiny" test which in my view is inapplicable here.

The ordinance also is rationally related to the avoidance of rent inflation. Large groups of unrelated persons typically have several independent sources of income while a traditional family usually has only one basic source of income. Large groups therefore are willing and able to pay a higher rent than could a family. Thus, the whole rent structure of Belle Terre may well be affected by opening the area to large, unrelated living groups. Single families

who rent may be force to move out of the area when their landlord increases the rent to a level he knows large unrelated groups can and will pay. Perhaps rent controls would have been a better solution, as the majority suggests; but the rationality test does not demand that the means employed be the best means available. The restriction on the number of unrelated persons who may live in a single dwelling bears a significant relationship to rent control.

Finally, the ordinance is related to the prevention of traffic, parking, and noise problems. These problems occur when one-family homes become occupied by large groups of unrelated persons. There are likely to be more people and more motor vehicles.

The majority holds that the ordinance is not rationally related to these objectives for three basic reasons: (1) there was no evidence presented that groups of unrelated persons are always different from traditional families with respect to these problems; (2) there were more effective methods available to the Village to solve these problems; and (3) there were methods at least equally effective available to the Village which would have been less intrusive upon appellants' rights.

The Village need not establish that there *always* is a difference between unrelated groups and families with respect to these problems. It is enough that such differences usually exist. I believe that the Village has established that fact. Moreover, since the majority applies a new standard which requires proof by the Village of rationality, and the Village apparently did not anticipate such a standard, at

the very least it seems to me that a remand should be ordered to allow the Village an opportunity to prove these matters.

The fact that the means selected by the Village may not have been the most efficient or the least intrusive of those available is legally immaterial under the means-scrutiny test. If the means selected contributes substantially to the end, the equal protection clause has not been violated. It is not our function to engage in such intense review of legislation unless the classification is suspect or a fundamental interest is adversely affected.

I would affirm the judgment of the district court.

ON DENIAL OF REHEARING EN BANC

A poll of the judges in regular active service having been taken at the request of such a judge as to whether this action should be reheard en banc and there being no majority in favor thereof, it is

Ordered that rehearing en banc is denied. Chief Judge FRIENDLY and Circuit Judges HAYS, MULLIGAN and TIMBERS dissent.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

TIMBERS, Circuit Judge (dissenting from denial of reconsideration en banc):

TIMBERS *opinion.*

In view of the unusual circumstances under which en banc reconsideration of this case is being denied, I think that in fairness and in the public interest I should state my reasons for dissenting from the denial of en banc reconsideration.

First, in this action involving the right of the 700 residents of the Village of Belle Terre, through their local government, to enact a one-family zoning ordinance, I have already stated in my panel dissent filed February 27, 1973, — F.2d at —, the basis of my disagreement with the decision of the majority in striking down the Village's zoning ordinance on the ground that it violates the equal protection clause. The crux of my disagreement with the majority centers upon its misapprehension of the Supreme Court's most recent equal protection decisions and the new standard of judicial review that they require. Assuming arguendo that the new means-scrutiny equal protection standard (based on a *correct* reading of the Supreme Court's recent decisions) should be applied to the uncharted area of zoning ordinances, then it seems to me that the Belle Terre ordinance is valid, for it bears a significant relationship to long recognized zoning objectives.

Second, the en banc vote here is 4-4. It is another instance, during the period that our Court has consisted of eight active judges, where en banc reconsideration of a substantial question of unusual importance is being denied despite the vote of four of the active judges in favor of en banc[1]—here,

Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers.

Third, the decision of the panel majority in the instant case, when read in conjunction with recent decisions of other panels of our Court in Aguayo v. Richardson, 473 F.2d 1090 (2 Cir. 1973), and City of New York v. Richardson, 473 F.2d 923 (2 Cir. 1973), makes it virtually impossible for a district court in this Circuit, or a panel of our Court, to determine what equal protection standard to apply in a case before it.

In Aguayo v. Richardson, we dealt with an equal protection challenge to New York experimental work project programs involving families receiving assistance under AFDC

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[1] See, e. g., Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 494 (2 Cir. 1971) (en banc denied, 4-4), cert. denied, 407 U.S. 926 (1972); Zahn v. International Paper Co., 469 F.2d 1033, 1040-42 (2 Cir. 1972) (en banc denied, 4-3, i. e. 4 in favor of en banc, 3 against), cert. granted, — U.S. — (1973), 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973); United States v. Puco, — F.2d —, — (2 Cir. 1973) (en banc denied, 4-4), slip op. 3295, 3304 (May 4, 1973).

But compare International Business Machines Corp. v. United States and Edelstein, 471 F.2d 507 (2 Cir. 1972) (en banc granted, 5-0, on February 14, 1973), It should be noted that in *IBM*, since three of the active judges were disqualified, the votes of all the remaining five active judges were required in order to en banc the case. See *Zahn, supra*, 469 F.2d at 1042. One of the five active judges concurred in the panel majority opinion. Another of the active judges wrote the panel dissenting opinion. If *either* of these two had voted against en banc, the case could not have been reconsidered en banc. Since *each* voted in favor of en banc, the desire of the other four to reconsider the case en banc was not thwarted. See International Business Machines Corp. v. United States and Edelstein, — F.2d —, — (2 Cir. 1973) (en banc) (Timbers, J., dissenting), slip op. 3375, 3394 (May 8, 1973).

program. We noted the development of a new equal protection standard which we described as either "a replacement for the 'two-tiered equal protection' which many have found unsatisfactory, . . . or as a narrowing of the gap between the tiers." 473 F.2d at 1109. We held that the New York work project program satisfied the new standard because experimentation to determine whether improvements can be made in the welfare system is a legitimate government objective. We rejected a claim that some of the details of the program were arbitrary and unreasonable, noting that " 'when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.' " 473 F.2d at 1110, quoting Louisville Gas Co. v. Coleman, 237 U.S. 32, 41 (1928) (Holmes, J., dissenting).

In City of New York v. Richardson, we were concerned with an attack upon New York State's requirement that residents of local social service districts contribute to the state public welfare fund on the basis of the number of welfare recipients in the local district. We held that an equal protection claim sufficiently substantial to require the convening of a three-judge district court was stated where it was alleged that the contribution system in effect required New York City residents to finance 74% of the state program where only 45% of the State's residents lived there. We reached this result by applying a new equal protection standard which we described as a "modified" rational relationship test. We observed that the Supreme Court's recent decision indicated that "[t]he two-tiered equal protection

doctrine seems to have begun to give way to a more graduated, sliding-scale test." 473 F.2d at 931.

In the instant *Boraas* case, the majority applied its own version of the new equal protection standard which it described as:

> "[a] more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." — F2d at —, slip op. at 2008.

The majority's decision, striking down a village zoning ordinance which limits the number of unrelated persons who may live in a single dwelling, represents an unusually extensive judicial inquiry into regulation by local government of land use. The majority held that the ordinance was not "*in fact* substantially related" to the well-recognized zoning objectives asserted by the Village to justify its ordinance. *Id.*

In my view, the equal protection standards applied in these three decisions within a period of less than six weeks are highly inconsistent. They demonstrate an urgent need for en banc reconsideration and restatement of the proper equal protection standard to be applied. As Judge Kaufman correctly observed, "the outer boundary of [the equal protection] inquiry remains ambiguous". City of New York v. Richardson, *supra*, 473 F.2d at 931. In an area as vital as this one, we should not allow the equal protection standard to be applied by our Court to remain so uncertain pending still further decisions by our Court or by the Supreme Court.

The district courts in this Circuit are called upon to decide equal protection issues with increasing frequency, and on virtually a day to day basis. It is extremely important that we provide them with immediate useful guidance rather than abandon them to make what they will of recent Supreme Court decisions or, even worse, to confuse them with a series of conflicting decisions of our own. Certainly enough has been said in recent decisions of the Supreme Court to enable us to state with reasonable assurance some general guiding principles. I would do so by granting immediate en banc reconsideration of the instant case.

Finally, the Supreme Court's very recent decision in San Antonio Independent School District v. Rodriguez, —— U.S. —— (1973), 41 U.S.L.W. 4407 (U.S. March 21, 1973), strongly indicates that the traditional minimal scrutiny equal protection standard should have been applied in the instant case.[2] In *Rodriguez*, the Court held that "the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes", should be applied to determine whether a Texas program for financing public education complied with the equal protection clause. —— U.S. at ——, 41 U.S.L.W. at 4419. The Court stated that, because "the Justices of this Court lack both the expertise and the famili-

[2] Both the majority opinion of Mr. Justice Powell and the crucial concurring opinion of Mr. Justice Stewart expressly relied upon Chief Justice Warren's opinion in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Mr. Justice Stewart referred to *McGowan* as "[t]his settled principle of constitutional law" and as "a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." — U.S. at —, 41 U.S.L.W. at 4425.

arity with local problems so necessary to the making of wise decisions" with respect to the financing of public education, and because "in such a complex arena . . . no perfect alternatives exist", the Court would not "impose too rigorous a standard of scrutiny." —— U.S. at ——, 41U.S.L.W. at 4419. In short, the Court refused to "intrude in an area in which it has traditionally deferred to state legislatures." State or local decisions regarding limitations on the use of land traditionally have been accorded this same great deference by federal courts for the same reasons a state's handling of public expenditures are not be to disturbed. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In the light of *Rodriguez*, it seems to me that a *fortiori* the decision in the instant case, which surely constitutes a substantial interference with a municipality's zoning policies, was erroneous. We should correct this error on our own initiative through en banc reconsideration rather than forcing the Village of Belle Terre to incur the unnecessary expenditure of time and money to obtain what would appear to be sure reversal by the Supreme Court. I do not think the Village of Belle Terre should be compelled to march up the hill for the sake of marching down again, in view of the Supreme Court's decision of a fortnight ago in *Rodriguez*.[3]

For the reasons stated above, I respectfully but most emphatically dissent from the denial of reconsideration en banc.

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[3] I am mindful, of course, that none of us was aware of the Supreme Court's decision in *Rodriguez* at the time of the en banc poll in the instant case. That is all the more reason for reconsideration en banc now—to harmonize the law of this Circuit with controlling Supreme Court law.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

MANSFIELD, Circuit Judge:

Some statements in the dissent of my distinguished brother Timbers from the Court's denial of an *en banc* hearing [1] call for a reply.[2]

Most members of this Court, including our dissenting brother, have construed certain recent Supreme Court decisions as indicating a trend toward modification or softening of what had previously been interpreted as a rigid, two-tiered Equal Protection doctrine.[3] In my judgment there

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[1] An *en banc* review was denied pursuant to the provisions of 28 U.S.C. § 46(c) because it was not requested by a "majority of the circuit judges of the circuit who are in regular active service."

[2] *En banc* review adds immeasurably to the expenditure of judicial time, energy and resources on the part of members of this already overburdened Court.

Some idea of this Court's current load of regular judicial business can be gathered from the fact that in the fiscal year 1972 it terminated 1,593 appeals, as compared with 959 appeals disposed of annually five years previously, or an increase of 66%. See Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year 1967, Table B1, page 181, and for the Fiscal Year 1972, Table B1, Appendix A-1. Yet the size of the Court has remained the same, with one judgeship now vacant for almost 17 months.

Nor are *en banced* appeals, with rare exceptions, disposed of expeditiously, since all members of the Court are called upon to participate in the hearing and decision. Experience reveals that the *en banc* process may delay this Court's ultimate decision of an appeal by more than six months.

[3] Aguayo v. City of New York, 2 Cir. 1973, 473 F.2d 1090 at 1108-1110 (per Friendly, Waterman, Hays, C.JJ.); City of New York v. Richardson, 2 Cir. 1973, 473 F.2d 923 at 930-931 (per Kaufman, Lumbard, Mansfield, C.JJ.); Green v. Board of Education, Jan. 29, 1973, Slip Sheet 1723 at 1726-28 (per Feinberg, Lumbard, Mansfield, C.JJ.); Boraas v. Village of Belle Terre, 2 Cir. 1973, — F.2d — (per Mansfield, Oakes, Timbers, C.JJ.).

is no inconsistency between general observations voiced by different panels of this Court, including the majority in this case, on the subject of this apparent trend toward more elasticity in application of the basic principle of Equal Protection. But even if there were some differences in the broad language used by different panels, it would be pointless and unwise to attempt to express a standard in crystallized terms along the lines suggested by the dissent.

An *en banc* hearing would not contribute in any significant way to clarity and coherence in the area of Equal Protection for the reason that in pursuing the elusive quest for standards we are dealing with broad general principles which must be capable of adaption to widely varying factual contexts. Nothing we might say about this proteus-like concept, therefore, could be sufficiently precise to have a binding effect throughout the Circuit in other cases, which would inevitably involve significantly different factors, especially since our views would be expressed by a divided court, with district judges looking primarily to the Supreme Court for ultimate guidance. At no time has the principle of Equal Protection been articulated by the Supreme Court or by ourselves as a "litmus-paper test" or precise rule. Indeed, the Supreme Court's description of "Due Process" in Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L. Ed 2d 1307 (1960), as an "elusive concept [whose] exact boundaries are undefinable and [whose] content varies according to specific factual contexts" applies with the same force to Equal Protection. While certainty in the law is a virtue, history discloses that resilience is equally

essential. A certain degree of flexibility in describing Equal Protection must therefore be inevitable.

Nor does the Supreme Court's 5 to 4 decision in San Antonio Independent School District v. Rodriguez, — U.S. —, 93 S. Ct. 1278, 35 L.Ed.2d — (Mar. 21, 1973), alter the foregoing. There the Court, following a well beaten path used in review of certain types of economic discrimination, applied "the traditional standard of review" to state legislation of an essentially economic nature, which was challenged because of its social consequences. Here we are not concerned with commercial legislation but with a local ordinance directed squarely against the personal right of individuals to associate and live together and found by the district court to be "impossible to justify" in terms of "such familiar zoning objectives as safety, adequate light and air, preservation of the lands from over-intensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water sewerage, school, park and other public services." If anything, our decision here is in accord with the Supreme Court's decision in *Rodriguez*. In describing the standard applied by it, the Court there stated that "the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated State purpose" (*id.* at —, 93 S.Ct. at 1288), that "the traditional standard of review . . . requires only that the State's system be shown to bear some rational relationship to legitimate State purposes" (*id.* at —, 93 S.Ct. 1300), and that "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a

legitimate state purpose or interest" (*id.* at —, 93 S.Ct. at 1308). These statements not only are consistent with our review but would require us to nullify the Belle Terre ordinance for failure to further any legitimate zoning objective.

This is not, therefore, one of those truly extraordinary cases that warrants review *en banc*. Nor would such a hearing render unnecessary the expenditure of time and money required to determine whether the Supreme Court will agree with our disposition of this case, since a majority of this Court might well agree with the result reached by the majority of the panel and, if it did not, appellants would undoubtedly seek review by the Supreme Court.[4] Belle Terre has open to it a simple and inexpensive solution. It can enact a new ordinance bearing some rational relationship to legitimate zoning objectives.

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[4] While we feel confident that our views will not be disapproved by the Supreme Court, we would not be so vain as to predict that we are "sure" of its action in this fluid area of the law.

APPENDIX B

Opinion of the District Court for the Eastern District of New York (Reversed see 476 F.2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 C 1030

BRUCE BORAAS, et. al.,

Plaintiffs,

—against—

VILLAGE OF BELLE TERRE, et. al.,

Defendants.

MEMORANDUM INCORPORATING FINDINGS OF FACT AND ORDER

Appearances:

LAWRENCE G. SAGER, Esq. and ARTHUR N. EISENBERG, Esq. (BRUCE J. ENNAS, Esq. and Mrs. SUSAN N. HERMAN [student assistant] Of Counsel)
for Plaintiffs

BERNARD E. GEGAN, *Esq.* (James J. von Oiste, Esq., Village Attorney, Of Counsel)
for Defendants

DOOLING, D.J.

The present action was instituted by Edwin and Judith Dickman, husband and wife, as owners and lessors of a six bedroom one family dwelling located at the intersection of

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Harbor View Road and Cliff Road in the Village of Belle Terre, and three tenants or occupants of the dwelling. Plaintiff Michael Truman is a twenty-five year old graduate student and teaching assistant at the State University of New York at Stony Brook, who is now in his fourth year of graduate study leading to a doctorate in sociology. He leased the Dickman house from the owners on or about December 1, 1971, for a term ending May 31, 1973 at the rent of $500 a month. Plaintiff Bruce Boraas is twenty-four years old, in his third year of graduate study at the State University at Stony Brook, and is working toward a doctorate in sociology and holds a research assistantship. Plaintiff Anne Parish is twenty-three years old and is a third year undergraduate student at the State University at Stony Brook for the academic year which commences at September of 1972. The defendants are the Village of Belle Terre, an incorporated village, and a municipality under the laws of New York, in Suffolk County, and the Deputy Mayor and the Trustees of the village. The natural person defendants are sued in their official capacities only.

For purposes of the present motion there has not been any direct denial of the principal factual allegations of the complaint, and in general they, with the affidavits submitted on both sides, must be taken at this stage as substantially setting forth the conditions with respect to occupancy of the Dickman house. Plaintiff Boraas has been a resident in the house since about June 1, 1972, and has become a cosigner of an apparently new lease on the same lease terms as that originally signed by plaintiff Truman. He expects

to continue as a tenant until May 1973. Plaintiff Parish has not signed a lease, but a check of hers was tendered and accepted in payment of the rent for July 1972. She has been in occupancy since about June 1, 1972, and expects to continue in the house until the end of the term. Three additional students at Stony Brook are now, or have been until very recently, occupants but not lessees of the house: Franklin Beckman, a graduate student in the fifth year of a sociology doctorate program, who was also a teaching assistant; Michael Miranda who is a graduate student in sociology at Stony Brook but who may not continue in the house; and Leonard Cassara an undergraduate student at Stony Brook who planned to leave the house on or before September 1, 1972.

Each of the students occupies a separate bedroom in the house. The rent is apportioned among them, dinner is a common meal, household and yard-keeping chores are distributed among the occupants, and expenses for groceries, newspapers, telephone, utilities, fuel oil and milk are paid from a common treasury to which all contribute. For present purposes, it is not denied that the plaintiff students are living and cooking together as a single housekeeping unit. They are not related to one another by blood, adoption or marriage. What they have in common is that all are students at the State University at Stony Brook, and, in the case of four of the occupants, they have a common interest in prosecuting studies in sociology as graduate students.

The zoning ordinance of Belle Terre establishes a single district, the "A" Residence District, the boundary of which

is identical with the village boundaries. The ordinance provides that no building or premise shall be used and no building in future erected or altered in the village except for use as a one-family dwelling, for a public purpose area owned and operated by Belle Terre, or for accessory buildings (such as a private garage) used incidentally to a dwelling. The ordinance also provides that the lot area of each one-family dwelling shall be at least one acre with a frontage of 200 feet at the building line, residence buildings to be 60 feet back from the street, side yards to be not less than 35 feet on each side, the rear yards to be 90 feet deep.

The critically important part of the ordinance for present purposes is that part which defines "One Family Dwelling" and "Family." Section D-1.34a defines a one-family dwelling as a detached house consisting of or intended to be used as a residence by one family only as a family is defined in the ordinance, and the Section provides that in no case is a "lodging house, boarding house, fraternity house, sorority house or multiple dwelling" to be classified or construed as a "one-family" building. Section D-1.35a defines "Family" as "one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." The Section provides further that a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.

In early June 1972, the plaintiffs applied for beach privileges and were denied them on the ground that their

residence in the village was illegal and that papers were being prepared against them and their landlord. In mid-July a summons to appear before the Village Justice of the Community Center in Belle Terre was issued on a complaint that the plaintiffs Dickman were leasing, renting or otherwise permitting their premises to be used other than as a one-family dwelling. Later that summons was withdrawn when it was realized that no order to remedy the alleged violation had been issued, served and disobeyed. Under date of July 28th an order to remedy violation was issued to the plaintiffs Dickman, advising them that there existed a violation of Article 3 of the Village Code in that premises were used other than as a one-family dwelling, and the plaintiffs Dickman were directed and ordered to comply with the law and remedy the conditions above mentioned on or before August 3, 1973. The order concluded that failure to remedy the conditions and to comply with the law might constitute an offense punishable by fine, imprisonment or both.

Article 4 Section B-1.12a of the Village Ordinance provides that whenever a building inspector finds a condition in violation of the ordinance he is empowered and authorized and duty-bound to order in writing the remedying of such condition in such manner and within such time as he may specify, and the order must then be served upon the owner, occupant or authorized agent by mail. Under Section B-1.18a failure to correct a condition within 48 hours after receiving the order to do so is deemed a violation of the ordinance, each day constituting a distinct violation. In addition, "any appropriate action or proceeding may be instituted . . . to restrain, correct or abate any violation, or to

prevent the occupancy of any such building . . . or to prevent any illegal act . . . or use in or about such building . . .". Article 8 of the zoning ordinance, in Section N-1.4a, provides that in cases where premises are used in violation of the ordinance any appropriate action or proceeding by legal process or otherwise may be instituted or taken to prevent an unlawful use and to restrain, correct or abate any violative use. The Section also provides that each violation of the zoning ordinance constitutes disorderly conduct, and that those responsible for or implicated in a violation of the zoning ordinance shall be disorderly persons and shall be liable for and pay a penalty not exceeding a hundred dollars or be imprisoned for a period not exceeding 60 days, or both. A separate and distinct offense is deemed committed on each day during or on which a violation occurs or continues.

Plaintiffs seek a preliminary and permanent injunction against the institution of criminal or civil proceedings against them to enforce the ordinance in so far as it prohibits residential occupancy by more than two persons not related by blood, adoption or marriage, and against the taking of any other steps intended to or having the effect of enforcing the zoning ordinance, including withholding normal residential privileges, such as beach privileges. The action also seeks a declaration that the building zone ordinance is unconstitutional.

Plaintiffs charge that enforcement of the ordinance against them denies them equal protection of the law, denies them the right of association secured to them by the First and Fourteenth Amendments, intrudes upon the

sphere of privacy secured to plaintiffs by the constitution and contravenes their right to travel.

The Dickman house is about seven or eight miles from the State University at Stony Brook. Each of the plaintiffs asserts that he or she looked for rental opportunities in the vicinity of Stony Brook and found that "except for University dormitory accommodations, the only rental situations which I could afford were shared residences like the Dickman house. Apartment rentals, when available, were too expensive."

It appears without contradiction that there are at the State University at Stony Brook twenty-seven dormitory buildings located on campus which can accommodate approximately 6,200 students. The accommodations range from single and double rooms to suites which accommodate four to six students in each suite. The supply of on-campus housing facilities so far exceeds the demand that it has been reported that two of the dormitory buildings will not be opened for the academic year 1972-1973. The cost of on-campus housing appears to be around $650 a year for each student, which would appear to be less than the amount apportionable to each student in the Dickman house.

Belle Terre has a population of about 700 persons and there are 220 homes in the village, all of which are one-family dwellings. There are two houses directly opposite the Dickman house, both of which have previously been rented, one house a four-bedroom house is reported to rent for $350 a month furnished, and the other a six-bedroom house is likewise reported to rent at $350 a month.

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Belle Terre is located wholly within the town of Brookhaven which has a population approximating 250,000. Brookhaven's zoning ordinance in Article 1, Section 85-1 defines a one-family dwelling as a detached building designed for or occupied exclusively by one family doing its own cooking. Family in turn is defined as a single individual doing his own cooking and living upon the premises as a separate housekeeping unit or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.

It will be seen thus that the plaintiffs do not contend that there are not similar dwelling houses which are available to them nor do they deny that there are apartment houses that they could occupy, or dormitory space. The definition of family used in the Brookhaven ordinance would seem to make one-family houses governed by that ordinance available for occupancy by such groups as plaintiffs' group, and their affidavits do not say, and are plainly not intended to say, that the plaintiff students have been unable to find dwelling houses similar to the Dickman house in communities other than Belle Terre which would be equally or more suitable.

The question then is whether the Belle Terre ordinance is valid insofar as it prohibits plaintiffs' occupancy even though the plaintiff students can locate exactly the type of occupancy which they seek in other communities. That in

turn raises the question whether the Belle Terre ordinance must be examined on the assumption, for purposes of testing its validity, that the one-family dwelling ordinances of all other communities are identical with Belle Terre's so that, if the Belle Terre ordinance is valid, the plaintiff students would be restricted to those areas in which communal types of occupancy are permitted, that is, where fraternity houses, club houses and boarding houses are authorized dwellings.

1. Defendants first raise the question of whether the present action can lie at all, and lie in the Federal Court. It is argued that the case is essentially one to enjoin the enforcement of a criminal statute, and that, in any event, the Court should abstain from interpreting the present ordinance until it has been interpreted by the State Courts. Neither contention appears to be sound. The case is not essentially one to enjoin the enforcement of a criminal statute. The action is one to declare a zoning law invalid and to prevent its enforcement. The case is civil in all of its material dimensions. The criminal sanction for enforcement of the ordinance comes to the rearward, far from the real site of the present action. The criminal sanction resembles the contempt order which can follow from the disobedience of a civil injunction. The occupancy itself herein is not criminal under the ordinance but forbidden; when an order to conform the occupancy to law is issued, it is disobedience of that order which is punishable, not the occupancy as such.

What is here involved is the validity of the order based on the ordinance to bring an end to the alleged violation of

the ordinance. If the ordinance were on its face and concededly valid immediate obedience could be expected and the criminal sanction might well be invoked because of an unwarranted and contumelious failure to obey a manifestly correct order. That is not the present case. Here, a constitutional challenge of substance is opposed to the order to terminate the alleged violation. There is here no contumacious disobedience of a plainly proper order to terminate a violation of a plainly valid ordinance.

No question arises under 28 U.S.C. § 2283 for no case is pending in the State Courts to which the present suit is or could properly be addressed. Rather there is here a direct invocation of the Federal Courts' jurisdiction over cases arising under the constitution and laws of the United States, including the Civil Rights Law, the latter of which obviates the necessity for satisfying the jurisdictional amount requirement. 28 U.S.C. §§ 1331, 1343(3); *Younger* v. *Harris*, 1971, 401 U.S. 37, does not reach the present case. The court there had before it the California Criminal Syndicalism Act which punished as crimes certain advocacies of sabotage, violence and terrorism as a means of accomplishing a change in industrial ownership or control or effecting political change. The plaintiffs in the Federal Court action feared prosecution for conduct which if proved would of itself have transgressed the letter of the criminal law. They sought to reach at once and in the Federal Court the issue of whether or not the statute could still be considered constitutional in the light of all that had occurred since the Supreme Court had considered the statute in *Whitney* v. *California*, 274 U.S. 357. It is not necessary to consider how far *Younger* v. *Harris* has changed the

law as it may have stood immediately before the decision was rendered; it is not in the area with which the present case is concerned. *Mitchum* v. *Foster*, 1972, U.S. , 32 L.Ed. 705, marks the difference. There the application of the State was to close down a book store as a public nuisance; a preliminary order prohibiting continued operation had been issued. The owner of the book store asked a three-judge Federal Court to enjoin further enforcement of the law. Whatever the precise extent of *Mitchum* v. *Foster*, it establishes the jurisdiction of the Federal Courts to entertain such cases under 42 U.S.C. § 1983 as the present one.

The present proceeding is exactly parallel to an Article 78 proceeding (New York Civil Practice Law and Rules, §§ 7801 *et seq.*) in which the validity of an ordinance is challenged. Such cases are conventional civil cases in which the courts reach for decision not only the adequacy of the support for action taken under an ordinance, but also the validity of the ordinance itself. See *Matter of Frantellizzi* v. *Herman*, 2d Dept. 1956, App.Div. 2d 980, 151 N.Y.S.2d 396; *Cf. Matter of Diocese of Rochester* v. *Planning Board*, 1956, 1 N.Y.2d 508, 521-522; *Matter of Westchester Reform Temple* v. *Brown*, 1968, 22 N.Y.2d 488, 494-497; *Matter of Unitarian Universal Church* v. *Shorten*, Nassau Co. 1970, 63 Misc.2d 978, 981, 314 N.Y.S.2d 66, 70. Section 7805 authorizes a stay of administrative action pending judicial review, in proper cases. New York procedural law similarly authorizes the use of the declaratory judgment to reach directly the question of the validity of a zoning ordinance where its meaning and application are clear

but the ordinance is claimed to be invalid in attempting to prohibit a use sanctioned by over-riding public policy and statute. The present action is, thus, strictly the federal alternative, in a federal question context, to such state forms of civil action as are usually invoked to test the validity of an ordinance on the basis of its terms or application, and is not in the nature of an action to enjoin criminal prosecutions.

It is contended that there are present unresolved questions of state law the resolution of which should precede an appeal to the Federal courts, since the resolution of the state law question may render it unnecessary to consider the Federal constitutional question tendered by plaintiffs. The specific argument made is that under New York Village Law Sections 175, 177, the authority of villages to adopt zoning laws is both granted and restricted and that the zoning is not valid zoning unless (Section 175) it is for the purpose of promoting the health, safety, morals, or the general welfare of the community through regulating and restricting the size of buildings, percentage of lot occupied, size of yards, courts and other open spaces, density of population and the location and use of buildings, structures and land, for trade, industry, residential or other purposes. Section 176 of the Village Law authorizes the Village Board of Trustees to divide the Village into zoning districts, and Section 177 requires that regulations respecting use of property within the particular zoning districts shall be made in accordance with the comprehensive plan and shall be "designed to lessen congestion in the streets; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to provide adequate

light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water sewerage, schools, parks and other public requirements."

Counsel point out that *City of Des Plaines* v. *Trottner*, 1966, 34 Ill.2d 432, 216 N.E.2d 116 invalidated a zoning ordinance which created a single family residence district and defined the family so as to require among the members of the occupying family relationship by blood, adoption or marriage, on the ground that the restriction of family to the familiar blood-and-marriage-related family did not serve a specifically zoning objective related to land use, although the City was restricted to such objectives by the enabling legislation. But in so doing the court pointed out that

> ". . . the considerations that the defendants advance to show that the ordinance classification is unreasonable and so violates the due process and equal protection provisions of the Constitution of the United States and the due process clause of the Constitution of Illinois, are relevant in determining whether the legislature has authorized such a classification."

Concluding, after discussing the cases which had considered the validity of blood-relationship limitations in single family dwelling ordinances, the Illinois court stated that the enabling legislation had not specifically authorized adoption of zoning ordinances that penetrated so deeply as the one in question into the internal composition of a single housekeeping unit. The court said finally that

". . . until it has done so, we are of the opinion that we should not read the general authorities that it has delegated to extend so far. Such a reading would generate constitutional questions of the kind suggested by the defendants concerning which we express no opinion."

(The court noted that the trial court had reached and resolved the constitutional issue raised by the defendant, and the court stated that the constitutional question presented was a novel one and the validity of the classification a matter of broad concern throughout the state so that the court did have jurisdiction on direct appeal.)

The New York cases have considered the blood relationship limitations in two aspects; *first*, whether a blood relationship limitation can be read into the expression "family" without being expressed, and *second*, whether the expression, when defined to require a blood relationship, will be given effect.

In the *Matter of Laporte* v. *City of New Rochelle*, 2d Dept. 1956, 2 pp. Div. 2d 710, 152 N.Y.S. 2d 916, *affirmed*, 1957, 2 N.Y.2d 921, it was held that a religious order could erect in a one-family zoning district a building to house sixty male members of a religious community where it was not shown that they did not constitute a single, non-profit housekeeping unit, and the ordinance defined "family" as meaning "one or more persons occupying a dwelling unit as a single, non-profit housekeeping unit". In *City of Schenectady* v. *Alumni Association of Union Chapter*, 3d Dept. 1957, 5 App. Div. 2d 14, 168 N.Y.S.2d 754, the court held that where a city's zoning ordinance provided both a

single-family residence district and a multiple dwelling district, a twenty-three member college fraternity chapter could not take over and occupy what had been a one-family dwelling since a college fraternity of twenty-three resident members was not a single family. The court considered that the ordinary and commonly accepted meaning of "single-family residence" and "one-family dwelling", in the light of the obvious objectives of the zoning ordinance, made the fraternity's approach unrealistic and without merit. The court was helped in its interpretation by the fact that the multiple-dwelling district did permit occupancy of buildings by private clubs, fraternities and lodges. The fraternity had challenged the validity of the ordinance as unconstitutionally discriminatory, and as to inequitable to justify injunctive relief, and the court summarily rejected the argument on the ground that the zoning ordinance had been generally sustained as constitutional in earlier litigation.

More recently in *Town of Henrietta* v. *Fairchild*, Monroe Co., 1967, 53 Misc. 2d 862, 279 N.Y.S.2d 992, the court held that an owner's occupation of a one-family type of building was not permissible, but constituted an occupancy more like that of a boarding house, where it appeared that the landowner was a bachelor and had always had living with him from 3 to 7 young men who were also bachelors (with one exception) of similar occupations to the landowner's and who contributed an aliquot share to the maintenance of the property, its furnishing, food costs, entertainment costs, liquor purchases, etc. The court noted that the landowner himself kept four automobiles on the property, three of which were in running order, and that the

co-occupiers used another three cars in connection with the property. The words of the ordinance "single-family dwelling" were not defined but the term "boarding house" was defined as including any dwelling in which more than three persons individually or as families were housed or lodged for hire with or without meals.

On the basis of these cases it would appear that New York does countenance the use of a single family definition which requires the existence of blood relationship and marriage although its courts have not directly considered the issue of validity either as a matter of interpreting zoning enabling acts or as a constitutional matter. *Abbot House* v. *Village of Tarrytown*, 2d Dept. 1970, 34 App.Div.2d 321, 312 N.Y.S.2d 841, at first reading seems to suggest that a blood relationship requirement would be considered invalid in New York as against a claim to occupy advanced for two groups of siblings living under the care of a married couple substantially in a family style, but the zoning ordinance there in question did permit of non-related groups in one-family zoning districts provided the group was not larger than five in number. Moreover, the occupancy was by a group formed under the provisions of Sections 371 and 374-b of the New York Social Services Law. The court decided the case on the ground that the local zoning ordinance was in conflict with an over-riding state law and policy favoring the care of neglected and abandoned children and exceeded the authority vested in the village. *Abbot House* does not intimate that in any other context such a limitation as the blood-relationship and marriage limitation on one-family occupancy would have been similarly regarded as either invalid or unauthorized.

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The New York law cannot be said to be unresolved in a sense relevant to the present case. The New York courts have not, indeed, considered the constitutional issues raised by the present plaintiffs in the context of the legality of the blood-relationship and marriage limitations either as a direct constitutional question or as subject matter presenting such serious constitutional problems that it ought to be a factor for weighing in the interpretation of enabling legislation. The New York courts have held that one family dwelling zoning districts can be created, and that the expression in itself does not necessarily exclude what counsel have aptly called "voluntary families" of persons unrelated by blood or marriage, that such interpretation can be placed on the single family dwelling district zoning ordinance if the context indicates that kind of an intention, and that where there is an explicit limitation to marriage-and-blood related families it will be given effect as against "voluntary families" even if the definition also includes parent-child relations created by "adoption". The New York courts have held that a clearcut single-family dwelling ordinance of the related-by-marriage-or-blood type must yield to paramount legislation of the state which plainly overrides it.

The New York courts have gone farther. They clearly recognize that an ordinance cannot stand where it directly excludes a constitutionally protected activity in a region which is the normal sphere of exercise for that activity. Three cases involving places of worship or church-related buildings have made that clear. *Matter of Diocese of Rochester v. Planning Board, supra,* arose on review of the refusal of a zoning authority to grant a variance for the erection of a church building at the center of a one-family dwelling

zoning district. The zoning authority was prepared to authorize building the church at the outskirts of the district, where new building was going on apace, but the court found that so to restrict the location of the church would be to infringe the first amendment liberty of worship. The court was clear that it was the purpose of the occupancy alone that resulted in the court's overruling the determination of the zoning authorities. Similarly in *Matter of Westchester Reform Temple* v. *Brown*, *supra*, the court was satisfied that the refusal to grant a variance to extend an existing church structure would have been unimpeachable administrative action had not the issue been one that involved the demonstrated need for an expansion of the synagogue property structures in question. Again the court held that the fact that the variance was sought in the service of an interest that was constitutionally protected, required the setting aside of zoning authority action which in other contexts would have been thoroughly correct. And finally in Matter of *Unitarian Universalist Church* v. *Shorter*, *supra*, a church-related day care center for children was held to be within New York policy and constitutional protection, and thus could not be excluded from the zoning district from which, but for the constitutionally and policy protected kind of use, it could plainly have been excluded.

Plaintiffs here present no claim of a continuing right of occupancy other than that which flows from their constitutional right to continue in occupancy, and if relegated to the State Courts, they would present exactly the same constitutional contentions there, in the confidence that they

would, under New York law as a matter of Federal constitutional necessity be heard just as they are being heard in the present context and in the present case. Plaintiffs have chosen the federal forum for the hearing and decision of their federal constitutional claims. "Plainly escape from that duty is not permissible merely because State Courts also have the solemn responsibility equally with the Federal Courts of enforcing rights granted by the constitution." *Zwickler* v. *Koota*, 1967, 389 U.S. 241, 248. In the present case a state court decision holding that the ordinance, construed as the village has construed it was beyond the authority granted to the village by the New York Village Law, could apparently be based only on the argument that to hold otherwise would impose on Sections 175 and 177 of the Village Law an unconstitutional interpretation. Any unresolved question of the state law detectable here is, therefore, the federal question differently stated. The issue is the same. *Cf. Wisconsin* v. *Constantineau*, 1971, 400 U.S. 433; *Palo Alto Tenants Union* v. *Morgan*, N.D. Cal. 1970, 321 F.Supp. 908, 910.

2. Analysis of the interests involved is not easy. Certainly families made up of a husband and wife and their children and adopted children have a right of association, a right to be private in their homes, a right to live in a one-family dwelling area, and, all seem to be agreed, a right to live in an area which is restricted to one-family dwellings used and occupied as such. Certainly, and equally, the plaintiff students, and similar student-groups, have an unquestionable right to live together in student groupings, to have their meals together and to share the expenses of

their cooperative living. Certainly their pursuit of study in the same institution, and, at least in principal part, in the same field of study, is an additional interest of association which they are at liberty to promote and enhance by adding to attendance at common classes living together and even studying together. All these interests are legally protected to some extent. Certainly they are interests of association protected from prohibitions, exclusions, and inclusions imposed in form of law that have no warrant in some distant public interest that overrides the public interest manifested in extending the sanctions of legal recognition and protection to the interests of association. In a world in which increasing amounts of land surface are zoned for different sorts of uses the associative interests advance a claim to an appropriate place responsive to the kind of cooperating association that they are and have a right to be. Having associated themselves in groups, a traditional family, or a group of students living together, have each whatever rights of privacy and association can fairly be ascribed to each such group given its nature. That the rights would be identical with those accorded other groups could hardly be expected since they are differentiated and not identical sorts of groups. In the cases of a student group living in a suite in a university dormitory, taking their meals in common or in a house dining room, or a student group living in a university apartment building in which the students provided their own meals and their own rules of domestic conduct, their rights of privacy would have such a contour and be subject to such limitations on privacy, as were appropriate to university life and to the inevitable terms of agreement prevailing between the group and the university.

Presumably the plaintiff students—and similar student groups—by the lease-terms under which they hold, surrendered some of their rights of privacy to the landowner. But whatever rights of privacy they have are free from unwarranted public intrusions and from restrictions upon the exercise of personal rights which amount to intrusions on the privacy to which, as the group that they are, they are entitled. And traditional families, too, have their comparable complex of rights, limited by the nature of the family group and its ambience.

But none of these considerations advances the argument very much. To put it one way, the families of Belle Terre may regard the Dickmans' leasing of their house to the plaintiff students for occupancy by the student group as an intrusion, as an invasion of the villagers' interests of privacy and free association, just as students living in a dormitory or in a university apartment building might resent it as an intrusion upon and an invasion of their rights of privacy and association if the university leased any apartments to casual non-student families of husband, wife and children. The question ultimately posed is whether it is lawful to have a one-family dwelling zoning district which excludes equally small household groups who impose no greater burdens of use on the land, the building or the surroundings than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children.

It goes too far too fast to take as a postulate for further argument that creating such a zoning district denies the right of association to anyone, invades anyone's privacy,

or restricts its enjoyment. Under the Dormitory Authority Act, (Public Authorities Law, Title 4, §§ 1675, 1692) dormitories can be and have been built for the very purpose of permitting students, including married students and their families, to associate. The Authority has the power of eminent domain (§1678[3], and its bonds, property and income are exempt from State taxation (other than transfer and estate taxes) (§1685). The plenitude of State power has been addressed to creating the State University for students to be educated and to live together. Their right of association and appropriate privacy is an assured and endowed reality. Nothing that Belle Terre can or has done can affect student groups except in the peripheral interests of student groups in realizing individual living preferences.

Plaintiffs essentially attack the ordinance on the assumption that it denies to the student group their fundamental rights of association and privacy and as such is an unconstitutional ordinance. If the ordinance was that in purpose or truly had that effect, the case would present no problem. The ordinance, indeed, denies the group the right to be associated in locus of residence with the householders of Belle Terre, and if enough other such ordinances existed, the supposed denial could approach the shape of a reality. But the objective facts do not have that stamp. Whatever the future may hold, there evidently is available to the students similar housing in other communities, and their affidavits do not deny that. They rather say that, if plaintiffs do not occupy the Dickman house, the alternative residences available to them, in addition to dormitory living, which

they reject, are apartments, which are too expensive for them, or other houses just like the Dickman house but in other communities. The thrust of the affidavit is not that just such a lease as the Dickman lease in just such a zoning district as Belle Terre's is their last resort, but rather that there is no reason and no right in their being excluded from the Dickman house with no other effect than to force them to take up residence in an exactly similar house similarly located in another community which has not so narrowly defined its one-family dwelling zoning district. The argument constructed is that if the Belle Terre ordinance is valid, every other community can adopt a similar ordinance and students will be denied the right to live in one-family dwelling districts all over—and be remitted to dormitory living or living in other kinds of zoning districts. Or, to put it in another way, the ordinance must be analyzed in terms of its being a universal one-family dwelling ordinance, since any town or village or city could incorporate similar restrictions into its one-family dwelling zoning district. The ultimate question, then, is whether the State can, without forbidden denial of rights of association and privacy to student groups living in small units under cooperative household arrangements, authorize municipal corporations to adopt zoning ordinances which provide for one-family dwelling areas in which the use of one-family dwellings is restricted to families made up of parents and their children—including adopted children—and the normal extensions of what is the familiar family of tradition, or the nuclear family of today.

The threshold question then becomes, whether there is any legally protectable affirmative interest in the estab-

lishment of even one such zoning district of marriage-and-blood-related families living in single-family dwelling houses. Such a zoning ordinance as Belle Terre's of itself indicates the existence of an interest on the part of such families in establishing a place of association to the exclusion of all other kinds of land uses however attractive, prestigious, or disfavored those other uses are. Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives as safety, adequate light and air preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services. (*Cf.* Village Law § 177). But such one-family zoning is at the very center of the mainstream of actual zoning goals and goal achievement, coming no doubt under the inclusive health and general welfare objectives. A one-family dwelling zoning district limited to families made up essentially of parents and their children needs no apologia. Such zoning is simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws. *Euclid* v. *Ambler Realty Co.*, 1926, 272 U.S. 365, 394, indicated as much in the most important of the early opinions in the zoning field. It may well be that such cases as *Eisenstadt* v. *Baird*, 1972, 405 U.S. 438, and *Mendel* v. *United States Civil Service Commission*, N.D. Cal. 1970,

312 F.Supp. 485, may imply for the future that such a zoning ordinance could not be so applied as to exclude a family group that differed only in that husband and wife, while living together with their children, had not married ceremonially. But that is not the present case, and, as the New York Court of Appeals cases cited above demonstrate, such zoning, although generally valid—arguably—could not be so applied as to exclude a family group of parents and their children on the bare ground that relation by marriage meant relation by ceremonial marriage, if that is an implication of *Eisenstadt.*

Every zoning ordinance, since it selects uses and privileges them, excludes all other uses in the land area covered by the zoning district. In a direct sense, the ordinance impinges upon every person in his freedom to exercise any one or all of the excluded uses. The dwelling district excludes the activities of all persons who have the right to and do make glue, or refine sugar, or run livery stables, or practice medicine, dentistry or architecture. Plainly it does not deny them the right to exercise their callings, but it does deny them the right to do so within the zoning district. Zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection. The deprivation may result from overselection, that is, for example, by adding forbidden requirements such as those in *Buchanan* v. *Warley*, 1917, 245 U.S. 60, in which the ordinance provided that whites could not acquire residences on blocks where the majority of the residents were colored, nor colored persons acquire residences on blocks in which the majority of the residents were whites.

Since Belle Terre has but a single zone, the occupancy that plaintiffs desire is wholly excluded from the village. But the village, it was indicated, is only about one square mile in extent, has but 220 houses and no more than 700 inhabitants. The village had the power to zone, and had the power to adopt a single zone, in view of its small size and apparent state of development. It is not claimed that the village was, as it were, gerrymandered into existence so that it could be a single-district village.

There is no overall zoning body with coercive authority to see to it that every lawful land use is provided for. Present provision for coordination of municipal zoning and planning by county planning agencies are somewhat tentative* and county and regional planning boards are authorized and in existence and their powers embrace recommendation to cities, villages and towns of a comprehensive zoning plan (General Municipal Law §§ 239-b, *et seq.*, § 239-d[5]). See also Chapter 24, Unconsolidated Laws, providing for creation of the New York State Urban Development Corporation (§§ 6251-6285) and the New York State Urban Development and Research Corporation (§§ 6301-6325). The Court of Appeals, too, has made it clear that the day of patchwork zoning is closing; *Udell* v. *Haas*, 1968, 21 N.Y.2d 463, emphasized that zoning ordinances have to serve the needs of the community as a whole, that the "comprehensive plan is the essence of zoning," since without it, "there can be no rational allocation of land use". (21 N.Y.2d at 469). The safeguard against mistaking the effect of a particular ordinance is to see it in its total setting, recognizing that its effect, and, therefore, its validity, may be decisively influenced by the way in which neighboring communities are zoned.

There is no obstacle to the plaintiff tenants' obtaining legally similar kinds of property in other communities than Belle Terre. There is no present threat that exclusion from Belle Terre would deny to the plaintiff students the right to live as the group that they are. It may be that, as plaintiffs suggest, other villages, and the Town of Brookhaven, might move in the direction of adopting such a definition of family as Belle Terre has adopted. Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented. But there is no genuine reason to expect such a consequence for it may be that such student groups as plaintiffs', with their ability to pay higher rentals because of their numbers, will be very welcome. It is not, of course, certain that where student groups are accepted, they may not concentrate, so that the plaintiff students would find themselves living in a student area that had become such through conversion of what was before that an area occupied almost exclusively by families made up of parents and their children. But it is somewhat difficult in theory for the plaintiff to object to that as a disfavored consequence without undermining their principal position.

The challenged ordinance does not define and exclude plantiffs' class, that is, groups of students from a single university living together under a common household arrangement that involves the sharing of at least one meal together. It may be that the plaintiff students are a class, and as members of a definable class, the class of student groups wishing to live together as a household, but outside of the precincts of the university, and it may be that they constitute a class with respect to whom legislation may

take a special view and make special provisions. Evidently zoning legislation has to some extent explicitly done so. Other zoning ordinances have been seen, including Brookhaven's, which explicitly take account of "fraternities", including them usually for zoning treatment in a class with other group housing arrangements which are distinguishable from conventional parent and children family groups. Student housing has been for 800 years a distinguishable subject matter for social and governmental concern and solicitude as well as for community and governmental restrictions. Just such arrangements as that which the plaintiff students have made is what in the medieval university of Paris was the *hospitium* and at Oxford the *aula*. Indeed, there is reason to believe that it was out of, for example, the *aulae* of Oxford that the colleges of Oxford evolved and which attracted first charitable and later governmental endowments. See, 6 Cambridge Medieval History, Rashdall, The Medieval University, 559, 574-375, 590; Holmes, Daily Living in the Twelfth Century, 1952 (Repr. 1964), 83; Schachner, The Medieval Universities, 1938 (1962 Repr.), 313, 331-339. Relations between the community and the University, centering often on issues of public order and on economic issues over the local cost of food and housing, have been trying and difficult incidents of a complex set of relationships that have persisted for seven centuries and more. See Schachner, Medieval Universities, *supra*, 189 *et seq.*; *Daly*, The Medieval University, 1961, pp. 190 *et seq.* Obviously student housing, specifically as such and oriented to the idea that students wish to live and learn together, is a matter that has been regarded as impressed with a public interest and has commanded public interven-

tion through the exertion of the power of condemnation and the pledge of the public credit to build housing for students as students and because they are students. The student group as a household unit does from a class having legally protected interests and legally recognized claims on public protection and benefaction. It is idle, after these centuries, to suggest that a student population does not present both a problem and a benefit to the communities in which the student population exists. But for a one-family dwelling house zoning district to fail to include in its embrace the sub-class of student groups which are no larger than is the ordinary parents and children family can hardly be supposed to discriminate against the student group, or to deny it the right to exist, or to infringe its liberties of location. It is inevitable that its liberty of location will be a matter of concern and of sporadic restriction. But in the absence of a showing that the restriction on the student units' liberty of location has advanced to the point at which the student group is forced to the hardly appalling choice between disbanding, or living in a club and fraternity zone, or living together within university precincts, no substantial constitutional question is presented.

The conclusion reached is in result the same as that in *Tenants Union* v. *Morgan, Supra*, 321 F.Supp. 908, but it is not considered that the case may be rested on population density, traffic problems, overloaded parking facilities, and the effect on rentals generally. *Kirsch Holding Co.* v. *Borough of Manasquan*, 1971, 59 N.J.241, 281 Atl.2d 513 reached a different conclusion, and it is plain enough that *Des Plaines* v. *Trottner, supra*, reached a different result. Both opinions consider the issue thoroughly, but appear to

reject the idea that there can be a legally protected affirmative zoning interest in the family made up of married parents and children *qua* just such a family, and the failure to accept that as a proper zoning consideration appears strange and unaccountable. Both opinions are satisfied to assert that certain uses which were no more abusive of the land than family uses and which were legitimate activities could not be zoned out of the area. That analysis appears defective; it seems to fail to take account of the essential nature of zoning as a choice among uses all of which are, in general, lawful activities which the persons normally conducting them have a perfect right to conduct and which cannot be discriminated against. The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged.

It follows from what has been said that the motion for a preliminary injunction must be denied. It is accordingly

ORDERED that the motion for a preliminary injunction is denied; the temporary restraining order is continued for five days after the entry of the present order to enable plaintiffs to apply to the Court of Appeals for an injunction pending appeal under Rule 8(a).

Dated: Brooklyn, New York
September 20, 1972

/s/ JOHN F. DOOLING, JR.
U. S. D. J.

APPENDIX C

Judgment Appealed From

(No. 5 5-1-73)

73-1607

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of May, one thousand nine hundred and seventy-three.

Bruce Boraas, Anne Parish, Michael Truman, Edwin Dickman and Judith Dickman,

Plaintiffs-Appellees,

v.

Village of Belle Terre, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Doerr, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolm, Trustee of the Village of Belle Terre,

Defendants-Appellants.

Appendix C—
Judgment Appealed From

It is hereby ordered that upon consideration of the motion made herein by counsel for the appellees by notice of motion dated April 16, 1973, for summary affirmance of the order for preliminary and permanent injunctions entered on March 29, 1973, by District Judge John F. Dooling of the United States District Court for the Eastern District of New York or, in the alternative, to refer this action to the Court that heard and decided the action in Docket No. 72-2040 affirmance be and it hereby is granted.

A. DANIEL FUSARO,
Clerk

Before:

HON. HENRY J. FRIENDLY
Chief Judge

HON. PAUL R. MAYS
Circuit Judge

HON. WILLIAM J. JAMESON
District Judge

APPENDIX D

Judgment of the District Court Which Was Affirmed By the Court of Appeals Judgment From Which This Appeal is Taken

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Bruce Boraas, Anne Parish, Michael Truman, Edwin Dickman and Judith Dickman,

Plaintiffs,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre.

Defendants.

This cause comes on for hearing upon the application of plaintiffs for a preliminary and a permanent injunction, pursuant to the order and opinion of the United States Court of Appeals for the Second Circuit, entered on February 27, 1973.

The Court has before it the prior submissions of the parties to this action, the aforementioned opinion of the United States Court of Appeals for the Second Circuit, the Court's Memorandum Incorporating Findings of Fact and

Order, of September 27, 1972, and the oral representations made to the Court by the parties to this action in conference on March 26, 1973, to the effect that neither party intends to supplement the evidentiary record now before the Court. And it appearing to the satisfaction of the Court that

(1) Final disposition of this action pursuant to Rule 65(a) (2) of the Federal Rules of Civil Procedure is appropriate, in that neither party intends to supplement the evidentiary record now before the Court; and that

(2) plaintiffs in their Complaint is appropriate and necessary, in that the findings of fact heretofore made and the opinion and order entered by the Second Circuit Court of Appeals in this action on February 27, 1973, necessitate the conclusion that the Building Zone Ordinance of the Village of Belle Terre insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage is violative of the equal protection clause of the Fourteenth Amendment, and in that irreparable injury will result to the plaintiffs if the criminal or civil proceedings threatened by the Village of Belle Terre pursuant to that ordinance are commenced.

Accordingly, it is

ORDERED AND ADJUDGED that Article I Sections D-1.34a and D-1.35a and Article II Sections DT-1.0, DT-1.1, D.T.-1.2 and Article III Section A-1.0 of the Building Zone Ordinance of the Village of Belle Terre to the extent that such provisions prohibit residential occupancy by more than two persons not related by blood, adoption or marriage within the Village of Belle Terre are hereby declared to be in violation of the United States Constitution. It is further

ORDERED AND ADJUDGED that defendants, their agents, their successors in office, and anyone acting in concert with defendants are hereby enjoined and restrained from instituting civil or criminal proceedings against defendants or in any way enforcing the aforementioned provisions or in any way penalizing plaintiffs pursuant to the aforementioned provisions of the Building Zone Ordinance of the Village of Belle Terre, insofar as such provisions proscribe residential occupancy by more than two persons not related by blood, adoption or marriage. It is further

ORDERED AND ADJUDGED that defendants, their agents, their successors in office, and anyone acting in concert with defendants, are hereby enjoined and restrained from denying to plaintiffs any of the normal rights and privileges of residence within the Village of Belle Terre such as beach privileges.

JOHN F. DOOLING, JR.
U.S.D.J.

DATE:

APPENDIX E

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Civil Docket No. 73-1607

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

THE VILLAGE OF BELLE TERRE, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Doerr, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolz, Trustee of the Village of Belle Terre.

Defendants-Appellants.

NOTICE is hereby given that the Village of Belle Terre and the individual defendants above named hereby appeal to the Supreme Court of the United States from the final judgment dated May 1, 1973 (Docket No. 73-1607).

This appeal is also intended to bring up for review the judgment of the Court of Appeals in the prior appeal in this action (Docket No. 72-2040), dated February 27, 1973.

Appendix E—Notice of Appeal to the Supreme Court of the United States

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated: May 16, 1973.

Yours, etc.

/s/ JAMES J. VON OISTE, ESQ.,
James J. von Oiste, Esq.,
Village Attorney, Belle Terre,
505 Main Street,
Port Jefferson, New York 11777

To:

LAWRENCE G. SAGER, ESQ.,
New York Civil Liberties Union,
Attorney for Plaintiffs-Appellees,
84 Fifth Avenue,
New York, N.Y. 10011.

/s/ BERNARD E. GEGAN, ESQ.
Bernard E. Gegan, Esq.
Of Counsel,
84 74th Street,
Brooklyn, New Yo[illegible]209

To:

CLERK OF THE COURT,
United States Court of Appeals
For the Second Circuit
United States Courthouse,
Foley Square,
New York, N.Y. 10007

SEP 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

THE VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

LAWRENCE G. SAGER
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In the

Supreme Court of the United States

October Term, 1973

No. 73-191

The Village of Belle Terre, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Doerr, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolz, Trustee of the Village of Belle Terre,

Appellants,

—against—

Bruce Boraas, Anne Parish, Michael Truman, Edwin Dickman and Judith Dickman,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby move to affirm the judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1973, on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

STATEMENT OF CASE

At issue in this suit is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families consisting of any number of persons related by blood, adoption or marriage, from occupying a residence within the Village of Belle Terre, which is zoned entirely for "one family" occupancy.

Appellees Edwin and Judith Dickman own a house in the suburban municipality of Belle Terre which is located in Suffolk County, New York. At the time this suit was commenced, appellees Boraas, Parish and Truman were tenants of the Dickmans. They lived in the Dickman house along with three other persons. All six tenants were students at the State University at Stony Brook, which is approximately a fifteen-minute drive from Belle Terre. The leasehold arrangement between the Dickmans and the students was to expire on May 31, 1973.[1]

Under the past and present living arrangement at the Dickman house, none of the six student occupants is related. Each occupies one of the six bedrooms and pays a portion of the rent. The six are organized and function as a single housekeeping unit insofar as they use the common cooking facility, dine together and share housekeeping, "yard" chores, and a "house" checking account from which dis-

[1] The leasehold arrangement which was to expire on May 31, 1973 has been extended. And of the original tenant plaintiffs in this action, Bruce Boraas and Michael Truman continue to occupy the house which they share with other students with whom they are not related. Anne Parish is no longer a resident of Belle Terre.

bursements for necessary household expenses are made. It is conceded that all of the occupants have behaved in a responsible manner, and no immoral conduct on their part is suggested.

Boraas, Parish and Truman each came to the Dickman house after extensive individual searches for accommodations in the Stony Brook vicinity. Each found that rents were prohibitive for the few apartment units which were available and that only dormitories on campus or cooperative residences like that which they evolved in the Dickman house were financially feasible. Moreover, each of the student appellees has found the arrangement in the Dickman house to afford an attractive, convenient and congenial residential life style—and one which affords a useful forum for scholarly exchange.

The Building Zone Ordinance of the Village of Belle Terre restricts the use of land in the village to single family houses, and further, restricts the actual occupancy of each house to a single family. "Family" is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family." [Article I, Section D-1.35a]

On June 8, 1972, Boraas and Truman were denied residents' beach passes because they were regarded by a Village official as "illegal residents," and as such not entitled to beach permits. On July 19, 1972, the Dickmans, the owners-

lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village Code required a 48-hour notice of violation, which had not been complied with, the summons was withdrawn. On July 31, 1972, the Dickmans were served with the required "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972.

On August 2, 1972, this action was commenced in the United States District Court for the Eastern District of New York, under the federal Civil Rights Act of 1871, 42 U.S.C. §1983, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption or marriage." Jurisdiction was grounded on 28 U.S.C. §§1331(a), 1343, and 2201. Pending a hearing on the constitutional issues, District Judge John F. Dooling, Jr. issued a temporary restraining order. Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 denied the motion for a preliminary injunction and upheld the validity of the ordinance.

Plaintiffs appealed the denial of the preliminary injunction to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, *inter alia*, that "[t]he discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives." 476 F.2d 806, 818 (1973). Accordingly, the Court of Appeals reversed the order of the district court

and remanded the matter for further proceedings.[2] On remand to the District Court, and upon all the papers and proceedings heretofore had herein, and upon the oral representations made to the Court by the parties, to the effect that neither party intended to supplement the evidentiary record, District Judge Dooling entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement. The Village of Belle Terre appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. It is from this judgment that the Village of Belle Terre and the individually named defendants presently appeal.

ARGUMENT

The crux of this case was simply stated in the Memorandum of District Judge John F. Dooling, Jr., below:

> "The question ultimately posed is whether it is lawful to have a one-family dwelling zoning district which excludes equally small household groups who impose no greater burdens of use on the land, the buildings or the surroundings than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children." See Jurisdictional Statement submitted by appellants herein, at 71a. Cited hereafter as "Jurisdictional Statement."

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[2] Prior to remand, however, a poll of the judges in regular active service was taken at the request of one such judge as to whether this action should be reheard *en banc*. As a majority of the active judges did not vote in favor of a rehearing *en banc* the request was denied. Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers dissented from the denial of rehearing *en banc*.

In justification of the challenged ordinance, defendants below proffered two sorts of governmental interests: first, the desire of the present members of the community to surround themselves exclusively with people like themselves, *viz.*, traditional families, and second, a variety of purported concerns within the ambit of traditional zoning goals, such as the regulation of population density and traffic flow. But as to the latter category, Judge Dooling found, as a factual matter, that the ordinance was "all but impossible to justify" in terms of "such familiar zoning objectives as safety, adequate light and air, preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services." Jurisdictional Statement at 74a. The Second Circuit Court of Appeals concurred in this finding:

> "If some or all of these hypothetical [traditional] objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support." Jurisdictional Statement at 20a.

The defendants proffered virtually no evidence of any kind in support of their claim that traditional zoning objectives would be furthered by the ordinance.[3] On re-

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[3] The only evidence submitted by the defendants which bore even remotely on the question of traditional zoning interests were the following brief representations in an affidavit by the village clerk and treasurer: "There are 220 homes within the Village, all of which are one-family dwellings. Two houses directly opposite the Dickman house had previously been rented. The house directly opposite the Dickman's to the south is a four bedroom house. I spoke

mand, after the February 27, 1973, Court of Appeals decision, Judge Dooling offered the defendants an opportunity to supplement the record before he ruled on the plaintiffs' motion for a permanent injunction; the defendants declined to offer any additional proof. Jurisdictional Statement at 84a.

The issue for both Courts below thus became the legitimacy of social homogeneity as a goal of the police power. Circuit Judge Walter R. Mansfield, writing for the majority of the Court of Appeals, persuasively concluded that the fashioning of an exclusive enclave for traditional families was not a permissible end of government:

> "Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely the interest of the local community in the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others

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with the owner and was advised that it rents for $350.00 per month completely furnished. The house directly opposite the Dickman's to the southwest is a six bedroom house. I spoke with the former tenant who had leased the house until one month ago and was advised that the rent paid was $350.00 per month and the house was completely furnished." Affidavit of Harriet Coorssen in opposition to plaintiffs' motion for a preliminary injunction; Appendix to appellants' brief before the Second Circuit in this matter at 44a-45a.

who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966); cf. Moreno v. U. S. Dept. of Agriculture, 345 F.Supp. 310 (D.D.C.) (three-judge court) (per McGowan, Cir. J.), prob. jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.Ed.2d 485 (1972)."

• • • • •

"Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community 'Admissions Committee.' While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public." Jurisdictional Statement at 18a-19a.

The doctrinal contours of the Court of Appeals decision are strikingly similar to those of this Court's recent decision in *United States Department of Agriculture* v.

Moreno,[4] —— U.S. ——, 41 U.S.L.W. 5105 (June 25, 1973). In *Moreno, supra*, the Court invalidated an amendment to the Food Stamp Act of 1964, which generally excluded from participation in the food stamp program any household containing an individual who was unrelated to any other household member. In *Moreno, supra*, at 5107, the Court announced that "[u]nder 'traditional' equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961)." Applying the so-called "rational relationship test," the Court invalidated the challenged provision. In so doing, the Court considered the apparent governmental interest of excluding "hippies" and "hippie communes" from the food stamp program, and the asserted interest of minimizing fraud in the administration of the program. As to the latter interest, the Court held simply that it was not in fact advanced by the challenged provision, 41 U.S.L.W. 5107-08, and as to the former, that it was not a legitimate objective of government. *Id.* at 5107. The Court thus concluded that no rational basis for the provision existed and that it therefore was invalid. *Id.* at 5108.

Moreno, had it been decided by this Court before the Court of Appeals below ruled in this cause, could well have

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[4] It should be noted that the *Moreno* decision parallels the judgment below in actual substance as well as doctrinal framework. Both, as the appellant herein acknowledges, implicate "the rights of unrelated individuals to live together." (Jurisdictional Statement at 11.)

provided the mold from which the contested judgment was struck; as things stand, it is firm validation of that judgment.

CONCLUSION

For the reason that the decision of the Court of Appeals below in the instant matter is entirely consistent with this Court's decision in *United States Department of Agriculture* v. *Moreno, supra,* and for the other reasons adduced above, the judgment of the Court of Appeals in this matter entered on May 1, 1973 should be summarily affirmed on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS

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October Term 1973

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Opinions Below

The Opinion of the Court of Appeals for the Second Circuit (J.S. 1a-50a*), together with two opinions issued upon denial of rehearing *en banc*, is reported at 467 F.2d 806. The opinion of the District Court (J.S. 51a-80a) is unreported.

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* References to "J.S." are to the jurisdictional statement. References to "A" are to the single appendix.

Jurisdiction

The final judgment of the Court of Appeals was entered May 1, 1973 (J.S. 81a). Notice of Appeal to this Court was filed with the Court of Appeals May 17, 1973 (J.S. 86a). The appeal was docketed by filing a jurisdictional statement July 27, 1973 and this Court noted probable jurisdiction October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254 (2) since the United States Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under section 1254 (2). *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 82; *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134; Stern & Gressman, Supreme Court Practice 31-32.

Question Presented

Whether six unrelated students at the State University at Stony Brook have a constitutional right to occupy a one family residence in violation of a Village Zoning ordinance which defines its one family zoning district in terms of a family related by blood, adoption or marriage or, in the alternative, not more than two unrelated individuals.

Subsidiary to this basic question is the question whether the ordinance regulates a fundamental constitutional right so as to require a compelling governmental interest in justification; or lacking a fundamental right whether the interests affected occupy some intermediate position on a sliding scale of judicial scrutiny; and failing that, whether the ordinance is rationally adapted to a legitimate governmental purpose.

RELEVANT ORDINANCE PROVISIONS

BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE

ART. II, SECTION DT-1.0. For the purpose of this Ordinance the Village of Belle Terre will consist of one (1) district to be known as "A" Residence District.

DT-1.1. The boundary of said district is hereby established as identical to the Village boundaries.

DT-1.2. No building shall be erected, altered, or used and no premises shall be used for any other than a purpose permitted in this "A" residential zone.

ART. III, SECTION A-1.0. "A" Residence District No. building or premise shall be used and no building shall hereafter be erected or altered unless provided in this Ordinance except for one (1) or more of the following uses:

(1) One family dwellings.

(2) Public parks, playgrounds, recreational areas, and real property and structures owned and operated by the municipality and for municipal purposes of the Village of Belle Terre.

(3) Accessory buildings, including one (1) private garage when located on the same lot and when meeting requirements of Article III. Section A-1.4a: A-1.4b: and A-1.4c and when such buildings are incidental to the principal use of the dwelling and do not include any activity commonly conducted as a business. The private garage may be within or attached to the dwelling.

ART. I, D-1.34a. One Family Dwelling. A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined, in no

case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family.

D-1.35a. Family. One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

ART. VIII, SECTION M-1.4a(2). Each violation of this Ordinance shall constitute disorderly conduct. Every person violating this Ordinance, including the owner . . . and the lessee or tenant of an entire building or structure or premise in which part such violation has been committed or shall exist . . . or any other person who knowingly commits, takes part or assists in any such violation . . . shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues.

Statement of Facts

Appellant Belle Terre is an incorporated Village of the Fourth Class located on the North Shore of Long Island in Suffolk County, New York. The Village includes approximately 220 homes inhabited by about 700 people (J.S. 2a) and has a total land area less than one square mile (Special

Report on Municipal Affairs, State Comptroller, Leg. Doc. No. 95, transmitted to the Legislature April 2, 1970 [hereinafter cited as Comptroller's Report] at 130). The Village is located wholly within the Town of Brookhaven (population 250,000 (J.S. 58a), land area 270.1 square miles (Comptroller's Report at 58) whose zoning would permit occupancy by groups whose members are unrelated by blood, adoption, or marriage. (J.S. 58a).

The Building Zone Ordinance of the Village restrict the use of land to single family houses. Family is defined as follows:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family (J.S. 54a).

Appellees, Edwin and Judith Dickman, are the owners of a house in the Village of Belle Terre (J.S. 51a). They leased the house, on or about December 1, 1971, to appellee Michael Truman for a period of 18 months, said lease to terminate on May 31, 1973 (J.S. 52a). On or about June 1, 1972, appellee Bruce Boraas became a co-lessee (J.S. 52a). At about the same time appellee Anne Parish moved into the house occupied by the two lessees (J.S. 53a). Three other persons, not parties to this action, also became residents of the house. (J.S. 2a).

Two houses opposite the Dickman house, have each been rented at 350 dollars per month. One like the Dickman

house contains six bedrooms; the other is a four-bedroom house. (J.S. 57a). The lease on the Dickman house required monthly rent payments of five hundred dollars plus a one thousand dollars security deposit. All six residents made monthly payments and posted security, to defray these expenses, in proportion to the quality of their sleeping quarters. (A9, A11).

Of the six, all of whom are students at the State University at Stony Brook in the town of Brookhaven, none is related to any of the others by blood, adoption or marriage. During their occupancy of the Dickman house, the students ate dinner together and all performed household and yard-keeping chores. In addition to the aforementioned rent and security expenses, all contributed toward groceries, newspapers, telephone service, utilities, fuel oil and milk. (J.S. 53a).

On or about June 13, 1972, respondents Boraas and Parish were informed, at a meeting of the Village of Belle Terre Board of Trustees, that their occupancy of the Dickman house violated the Village Zoning Ordinance and that the Village intended to institute remedial legal proceedings. (A13).

On July 19, 1972, respondents, Edwin and Judith Dickman, were served with a Criminal Summons returnable before the Village Justice on July 28, 1972, charging them with a violation of the one-family Zoning Ordinance (J.S. 4a). The ordinance provides, *inter alia*, that each violation of its provisions shall constitute "disorderly conduct" and that the owner and lessee or tenant of a building where a violation occurs:

> shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues. (J.S. 4a).

Because the summons was served without having been preceeded by a 48 Hour Notice of Violation from the Village Building Inspector, the Village Counsel temporarily withdrew the Summons on July 28, 1972. This was followed on July 31, 1972, by service upon respondents Edwin and Judith Dickman, by the Village Building Inspector of the 48 Hour Order to Remedy Violation. On August 2, 1972, the present action was begun by the plaintiffs in the District Court, under 42 U.S.C. 1983 for an injunction and a judgment declaring the zoning ordinance unconstitutional. (J.S. 4a-5a). At that time, District Judge John F. Dooling, Jr. signed a temporary restraining order staying criminal proceedings and suspending the 48 Hour Order to Correct Violation pending the outcome of plaintiffs' action. (J.S. 5a).

On September 20, 1972, the District Court per Dooling, *J.*, denied the motion for a preliminary injunction in a decision upholding the validity of the ordinance. (J.S. 5a) because of the state interest in protecting and fostering the traditional family pattern through zoning limiting some areas to single family occupancy. The Plaintiffs appealed the denial of the preliminary injunction to the Second Circuit Court of Appeals, which reversed and remanded (J.S. 25a). That Court found that the goal of preference for traditional family organization through zoning "fails to fall

within the proper exercise of state police power" (J.S. 18a). The Court of Appeals found in addition that the distinction between related families and unrelated groups could not be proved to promote traditional physical zoning objectives, such as control of population density, traffic congestion and property values. On remand the District Court entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement (J.S. 83a-85a). In order to procure finality the Village appealed to the Second Circuit Court of Appeals which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. (J.S. 81a-82a). From this judgment the Village and the individual defendants appeal to this Court.

Statement of changed circumstances pending appeal

As recommended in Stern & Gressman, Supreme Court Practice 592, Counsel for Appellants call the Court's attention to a change in circumstances pending this appeal.

As of September 13, 1973, when Plaintiff-Appellees filed their motion to affirm, they noted (page 2 note 1): "The leasehold arrangement which was to expire on May 31, 1973 has been extended. And of the original tenant plaintiffs in this action, Bruce Boraas and Michael Truman continue to occupy the house which they share with the other students with whom they are not related. Anne Parish is no longer a resident of Belle Terre."

On October 23, 1973, counsel for Appellant was notified by a letter from the Village Attorney that the Plaintiff students no longer occupied the house owned by Plaintiffs Dickman. Further inquiry disclosed that they left sometime

in September. The Dickmans are presently (as of November 23, 1973) holding their house out for sale or rent, including to student groups—motivated by the same interest originally stated in their affidavit: "It is in our economic interest to continue to rent to them. Moreover, we are sympathetic to the needs of responsible students at Stony Brook who are unable to find adequate housing at a cost which they can afford." (A37)

Appellants submit that the case is not moot for two independently sufficient reasons. First, the Dickmans are co-Plaintiffs and continue to insist on violating the Belle Terre ordinance. A live and continuing adversary dispute exists between the Village and the Dickmans. Second, given the usual short duration of student leases the case is one like *Dunn* v. *Blumstein*, 405 U.S. 330, in which yearly challenges to the zoning law could be repeated yet evade review if termination of the short lease mooted the case pending appeal. (Accord, *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498; *Roe* v. *Wade*, 410 U.S. 113.)

Summary of Argument

Point I will argue that the Court of Appeals was incorrect in testing the validity of the ordinance by a sliding scale scrutiny as an alternative to either the traditional rational relationship or compelling governmental interest standards. Such an intermediate and variable judicial requirement totally ignores a host of cases establishing certain constitutionally preferred fundamental freedoms as a class apart from the infinite variety of interests regulable by the state within broad limits of reasonableness.

Point II will examine the Constitutional dimension of Plaintiffs' claim to reside together in a one family house, considered both abolutely (privacy and association) and comparatively to other permitted uses (equal protection). It will be demonstrated that privacy in the constitutional sense is not regulated by the Belle Terre ordinance and that Plaintiff's interest in associating together for residential purposes is neither fundamental nor absolute; but qualified by the Village's power to regulate the use of land and establish classifications rationally related to legitimate public purposes.

Point III will set forth the legitimate public purposes that land use regulations may pursue and demonstrate that occupancy of one family houses by traditional families is rationally adapted to carrying out such purposes.

A final brief point is addressed to plaintiffs' argument based on the constitutional right to travel.

POINT I

The Court of Appeals erred in judging the justifiability of the Ordinance according to a variable scrutiny standard depending on the "importance" of the interest adversely affected.

Viewed only as authority *United States Dept. of Agriculture* v. *Moreno*, 93 S.Ct. 2821, would seem dispositive of the argument that some stricter standard of review than rational relationship applies to laws distinguishing traditional families from unrelated groups; for in that case this Court with near unanimity reasoned that the validity of coverage provisions of the Food Stamp Act depended upon whether they rationally furthered any legiti-

mate purpose of the Act. Insofar as the zoning ordinance affects Plaintiffs' interest in accecss to housing of their choice this Court's holding in *Lindsey* v. *Normet*, 405 U.S. 56, also makes applicable the rational relationship test.

In invalidating the zoning ordinance in this case, the Court of Appeals disregarded the holdings of this Court and opted for a "more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." (J.S. 16a)

Appellants do not wish to rely only on the conflict between the sliding scale approach used below and the holdings of this Court in the *Lindsey* and *Moreno* cases. The error of the Court of Appeals' approach goes deeper than that.

The distinction between the broad spectrum of legitimate interests affected by state laws and the limited types of specially constitutionally protected rights is basic to our constitutional law. The strict judicial scrutiny undertaken when laws impinge on preferred freedoms is of long standing and not limited to equal protection cases. If a work requirement incident to the administration of unemployment compensation indirectly impinges on the First Amendment value of free exercise of religion a merely legitimate state purpose is insufficient. A balancing approach with the lesser means requirement is applied (*Sherbert* v. *Verner*, 374 U.S. 398); similarly with compulsory education laws that affect rights of conscience (*Wisconsin* v. *Yoder*, 406 U.S. 205). If a state's legitimate concern for the qualifications of its school teachers is expressed in a disclosure law that chills freedom of expression it is invalid because "even

though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton* v. *Tucker*, 364 U.S. 479; *accord*, *Roe* v. *Wade*, 410 U.S. 113).

The "strict judicial scrutiny" scope of review is commonly called the "new" equal protection doctrine. Our point is that, insofar as strict scrutiny is invoked because a classification impinges on a fundamental constitutional right it is not new at all; nor is it a phenomenon unique to equal protection issues raised because a legislative classification is involved. It is part of a total approach long followed by this Court in any case in which state laws interfere with the enjoyment of preferred rights secured expressly or implicitly by the Bill of Rights.

The entire system of judicial protection of preferred freedoms painstakingly built up by many cases over a long time rests on the understanding that there is a difference in kind, not merely in degree, between the few rights so fundamental as to be enshrined in the Constitution and the infinite variety of individual and social interests, all legitimate and worthy of protection, which are subject to compromise, adjustment and partial or total recognition through our majoritarian political process. As to these the Constitution requires only that they not be sacrificed arbitrarily, by laws not rooted in the reasonable pursuit of constitutionally permissible public purposes. This is the test under traditional substantive due process and is the same basic principle followed in equal protection.

The suggestion advocated in some writings and adopted by the Court below, that the Court exercise a variable strict

scrutiny according to a sliding scale of importance or fundamentality of the subject of a classification, fails to recognize the basic dichotomy central to the preferred freedom doctrine. It is a narrow gauge effort to tinker with the equal protection clause in a way inconsistent with larger principles of which issues of legislative classifications form only a small part. As this Court has only recently emphasized, it is not an appropriate judicial function to create new substantive constitutional rights under the guise of equal protection (*San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278.

POINT II

The Zoning Ordinance does not abridge any constitutional right of privacy to which the students are entitled nor does it impinge upon their right to associate freely for purposes which are constitutionally protected.

Introductory

The plaintiffs assert that any limitation on their desire to locate their type of occupancy any place they choose violates their right to privacy and association. This novel argument flies in the face of the basic postulate of zoning, upheld in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, that differing types of occupancy, each legitimate and constitutionally protected, may be separated and located in different zoning districts. Two families might find it convenient or even economically imperative to occupy together a large one-family house in a single family zoning district; that would not give them a constitutional right to do so however. The division of types of occupancy into one versus two family rests on a long-recognized rational basis of public welfare

and, as such, prevails over the personal autonomy of persons wishing to create occupancies incompatible with the zoning scheme. The plaintiff students' interest in this case is actually one of convenience pure and simple. However profound the concepts which they try to assimilate to their cause and however grand the rhetoric with which they surround their position it all comes to the same thing; a group of students want to combine to occupy in a zone legally limited to single family occupancy. They have no real interest beyond the desire to occupy the house. Take away the house and these students have no "sacred bond" or any other significant group identity or interest.

With regard to traditional families the Village sets apart the land because of what the family is; the plaintiff group is what it is because it wants to use the land. This is not the stuff out of which can be concocted a constitutional right to override lawful zoning arrangements.

Appellees' private conduct is not at issue

The Belle Terre Zoning Ordinance *quantitatively* restricts the *number of persons* who may occupy a single family dwelling. It places no express limitation whatsoever on the conduct of any individual legally residing in the community nor does it exclude any particular class of individual from such residence. The Village, which occupies less than one square mile of a 270 square mile township, is seeking merely to limit its population and thereby preserve its rural character.

The right of privacy cases of *Griswold* v. *Connecticut*, 381 U.S. 379; *Eisenstadt* v. *Baird*, 405 U.S. 438, and *Stanley* v. *Georgia*, 394 U.S. 557, cited by Appellees in the

Court of Appeals all deal with the state's right to legislate private morals. These cases are inapposite here since the ordinance does not address itself to the students' morals or to anyone else's. It expressly permits unmarried adults to occupy a single family dwelling in the Village. It merely limits their number to two. No restriction is placed on their sex; they may both be male, both female, or each of opposite sexes. No proscription is placed upon the manner in which they conduct themselves in the privacy of their own home. Their numbers are, however, limited so that the consequences of their conduct do not extend beyond the line of privacy which circumscribes their home to the detriment of their neighborhood.

Practices such as the pooling of funds by six adults each with an independent source of income to pay inflated rents thereby upsetting the community norm are discouraged by the ordinance. Avoidance of traffic congestion, air pollution, and danger to school children crossing streets are goals of the ordinance which indirectly limits the number of automobiles operated in the community. An abundance of stable families to provide an environment comportable with parents' ideals for raising their children is an end which the ordinance does in fact promote. The practices of individuals in the privacy of their own homes, be they of a sexual, academic, religious or political nature are neither addressed or circumscribed by the ordinance.

The constitutional right of privacy that has been found in the First, Ninth, and Fourteenth Amendments is a limited one. "[O]nly *personal rights* that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy" *Roe*

v. *Wade*, 410 U.S. 113, 152 (emphasis added) (citations omitted). The zoning ordinance does not "reach in" to plaintiffs' home in an attempt to dictate their private behavior or life style. It has to do with what types of occupancy the land may be used for—possession of land being an open and notorious fact. If a family occupies the house it may adopt whatever life style it wishes; if a student group attempts to occupy the premises it is an illegal occupancy without regard to their private mores. Surely, if the Dickmans, who own the house, lived there and rented rooms to several student boarders it would not be argued that there was a constitutional right to so flout the one-family zoning. Yet the same associational and life style arguments could be made there that are made here; a constitutional difference could not turn on the details of the domestic arrangement. It is thus apparent that respondents are really challenging the municipal power to have any one-family zones at all—as distinguished from boarding house and other multiple uses.

No constitutional right of association is infringed

Like the right of privacy, freedom of association is not without bounds. The right of association is an outgrowth of the First Amendment guarantee of free expression which has been held to carry with it the right to associate for the purpose of effective political expression and action. *NAACP* v. *Alabama*, 357 U.S. 449; *Shelton* v. *Tucker*, 364 U.S. 479. It has been extended to association to achieve the right to effective access to the courts. *NAACP* v. *Button*, 371 U.S. 415; *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1. All of the decisions have dealt with association as the sole practical means to the accomplishment of

some constitutionally protected goal. None have established a right of association simpliciter.

Joint residence and mutuality of association are certainly not synonymous. Plaintiffs' desire of a forum for scholarly exchange does not necessitate, for its satisfaction, a household arrangement violative of the Belle Terre zoning ordinance. Surely, students seeking to benefit from the ideas of their contemporaries have open to them options capable of affording opportunity for intelligent debate. The Belle Terre ordinance doesn't prohibit students greater in number than two from visting a single family dwelling; it merely proscribes their residence there. Furthermore, in this particular case, the State University at Stony Brook has furnished the students, at great taxpayer expense, with facilities adequate to provide the desired forum.

Plaintiffs have failed to show any fundamental right that will be denied them as a result of the Village's proscription of their occupancy of a single family dwelling. They instead contend that such occupancy is per se such a right, a position which is supported neither by the language of the Constitution nor the decisions of this Court. Any affirmative right of association, not supportive of an underlying fundamental interest, must partake simply of the general liberty protected from arbitrary limitation by the substantive due process guarantees of the Fifth and Fourteenth amendments. The case of *Roberts* v. *Clement*, 252 F. Supp. 835 (E.D. Tenn.), cited by respondents in the court below involved a state police regulation barring nudist camps anywhere in the state. The court held the law void for vagueness. The concurring opinion held the secluded,

unobstrusive practice of nudity protected by substantive due process from state limitation. The opinion rests on the proposition that private behavior which does not affect third persons is immune from state imposed morality—a situation in no way resembling that in this case.

In summary, the right of association, in its affirmative aspect, *i.e.*, the right to associate as an end in itself and not as incident to another constitutionally protected right, is a liberty not to be denied arbitrarily, without substantive due process. The state's interest in morality may be held insufficient for this purpose since injury to the public is hard to discern. In none of the cases, however, is it asserted that the right of association can be exercised in defiance of state law which rests on a reasonable ground of public welfare. Judge Darr's concurrence in the *Roberts* case never suggested that the right of nudists to associate gave them the right to maintain a nudist camp in an A-1 residence district. As Justice Black wrote for the court in *Adderly* v. *Florida*, 385 U.S. 242, constitutional rights, even preferred freedoms of the First Amendment, can be exercised only where people have a right to be for such purpose. If the right of free expression would not give respondents the right to establish a printing factory in a single family residence district then their right to associate cannot protect them in aggregating an unlimited number of unrelated dwellers under a single roof in the same residence district.

The ordinance does not unreasonably burden the legitimate interests of unrelated persons in access to housing

Appellants' basic position on this appeal is that since the ordinance neither uses suspect criteria nor attempts to regu-

late access to a fundamental right it must be sustained if it is rationally adapted to the achievement of a legitimate public purpose, as argued in Point III of this brief. Yet this is a fluid area of constitutional law and we are mindful of the Court's emphasis in *San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278, of the difference between absolute or total exclusion from a benefit as opposed to relative or partial disability. It is against this background that we wish to emphasize that under the total pattern of state action on this record Plaintiff students were not denied a "meaningful opportunity to enjoy" convenient and suitable housing.

The District Court recognized that "zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection." (J.S. 75a). The single zone which the Village constitutes was held proper "in view of its small size and apparent state of development. It is not claimed that the Village was, as it were, gerrymandered into existence so that it could be a single district village." (J.S. 76a). This accords with all available authority. *Matter of Fox Meadow Estates* v. *Culley*, 233 App. Div. 250, 252 N.Y.S. 178, *aff'd*, 261 N.Y. 506; *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 147 N.Y.S. 2d 738, *modified*, 1 App. Div. 2d 1034, 152 N.Y.S. 2d 738, *aff'd*, 2 N.Y. 2d 190; *Valley View Village* v. *Proffett*, 221 F. 2d 412 (6th Cir.).

Moreover, the Court below noted that the plaintiffs faced no legal obstacle to finding suitable housing elsewhere near their University. The Court emphasized that Belle Terre, a village of 700 people, is located wholly within the Town of Brookhaven (where the University is also located) with a

population of 250,000, and zoning that would permit group occupancy even in its highest zoning district. (J.S. 58a). Plaintiffs attempt to blunt the significance of the facts noted below by citing several village ordinances limiting unrelated group occupancy in various ways. Taking just the four villages in the Town of Brookhaven:*

Village	*Population*	*Land Area in Sq. miles*
Belle Terre	678	.8
Old Field	812	2.0
Port Jefferson	5,512	2.8
Bellport	3,046	1.0

The other Brookhaven Villages (Patchogue, Shoreham and Poquott) have no relevant restrictions. In comparing of the total population and land area affected by a limited definition of "family" with the remainder of the Town of Brookhaven, it is manifest that Judge Dooling was correct in his characterization of plaintiffs' situation.

The latitude of housing legally available to the plaintiffs in the Town of Brookhaven is in addition to the dormitory facilities at Stony Brook which are under-utilized and afford a wide range of choices from private rooms to suites which accommodate from four to six students. (J.S. 57a).

The poverty of the students' arguments of discrimination and deprivation of rights is apparent when one considers the bounty the state has lavished on them as a distinct class

* The Village population figures are taken from the 1970 Census: U.S. Dept. of Commerce, Bureau of Census (March 1973). The land area and Town population figures are found in Special Report on Municipal Affairs, State Comptroller, Leg. Doc. No. 95, transmitted to legislature April 2, 1970.

of citizens. Not only have public funds been devoted to the creation of the State University itself but also upon dormitory housing within which students, individually and groups, can enjoy to the fullest the scholarly community upon which they predicate their associational claims. No doubt realizing, as Judge Dooling pointed out (J.S. 78a-79a), that student groups create both benefits and problems for the community in which they live, the state has singled them out, not for discriminatory or inferior treatment, but as the particular objects of public bounty and solicitude. It is not everyone that enjoys publicly subsidized housing within walking distance of their work.

Yet the Court of Appeals, we submit inconsistently with its earlier rejection of the fundamental rights argument (J.S. 13a-14a), held the right of unrelated groups of persons to occupy a one family house not only fundamental but well nigh absolute:

> Nor are we persuaded to sustain the Belle Terre ordinance by the fact that dormitory housing is available to appellants at Stony Brook or one-family housing available in other nearby communities which have not enacted exclusionary zoning of the type here under attack. The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled, subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F. 2d 807 (1st Cir. 1970), affirming 312 F.Supp.

692 (D.R.I.1970). If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have.[9] The availability of housing in another community, therefore, does not constitute a defense. Carried to its logical conclusion such an argument might, after all local communities in an entire area had adopted unjustifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states. (J.S. 23a-24a)

The argument accepted by the Court of Appeals is a variant of the discredited camel's nose in the tent reasoning. The imagined future abuse of a power is advanced as an argument against the existence of the power. The fallacy lies in the supposed inability of the courts to distinguish between lawful and reasonable exertions of state police power and (as yet nonexistent) abuses of it. To such an argument (that the power to tax is the power to destroy) Justice Holmes gave the succinct and enduring answer: "The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co.* v. *Mississippi, ex rel. Knox*, 277 U.S. 218 at 223 (dissenting opinion).

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[9] See, e.g., Building Zone Ordinance of Village of Babylon, Art. I. § 100(28); Building Zone Ordinance of Sag Harbor, Art. II, § 1(d); Ordinances of the Village of Bellport, Ch. 10, Art. II, § 206.1; Zoning Ordinance, General Regulations of Town of East Hampton, § 309.5; Unified Code of Ordinances, The Village of Oldfield, Art. VII, Ch. 7, Zoning, Part. 7.2. (footnote by the court).

Belle Terre, because of its small size, is constituted wholly as a one family district. Larger communities, such as the Town of Brookhaven in which Belle Terre is situated, have multi-district zoning comprised of one and two family, multiple dwelling, commercial and industrial. A decision that a municipality may reasonably limit the number of unrelated individuals who may aggregate together under one roof in a one family district does not justify excluding them from other districts not limited to single family occupancy. The line would thus be easy to draw and would not involve the exclusionary consequences envisioned by the Court of Appeals.

Moreover, the commands of the Fourteenth Amendment are addressed to the State which is consequently accountable for the actions of its municipal subdivisions. Should any of the speculative fears hypothesized by the Court of Appeals ever materialize, and unrelated groups ever find themselves deprived of a meaningful opportunity to reside in convenient and fitting locations through the uncoordinated acts of local zoning authorities, then the constitutional responsibility would devolve upon the State to intervene—under penalty of invalidating all such local restrictions.

Of course, if one postulates at the outset an independently existing constitutional right to assemble for residential purposes anywhere one chooses, the Belle Terre ordinance is a total deprivation of that right. But in point of law no such right exists. Not even the most nearly absolute of preferred freedoms, such as the First Amendment right of free speech, would entitle someone to set up a newspaper printing factory in a one family residence district. As the Court said in *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908, at 911:

> Plaintiffs are unquestionably sincere in seeking to devise and test new life-styles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected but the right to live under the same roof, in any part of the city they choose, is not.

Nor are the cases cited by the Court of Appeals, *Buchanan* v. *Warley* and *Murdock* v. *Pennsylvania*, apposite to the problem at hand. In both cases there was an independently unconstitutional reason for the exclusion—race and religion respectively. Absent such an invidious classifying factor; and absent an antecedent fundamental constitutionally protected right, the question comes back to the equal protection inquiry: whether the line drawn by the law, admitting families and unrelated twosomes but excluding all other occupancies, is rationally adapted to the achievement of legitimate governmental purposes. To this question we now turn.

POINT III

The Zoning Ordinance is justified as an end in itself in that families are per se legitimate objects of public concern and support. It is further justified as a rational means toward the accomplishment of other lawful objects such as density control, community stability and rent control.

Introductory

The discussion under this heading will concern itself first with the threshold question, held adversely to Appellants below, whether a social preference in favor of promoting and supporting family organization through residential proximity is in itself a proper object of state police power. If this Court agrees with Appellants' position that there is nothing in the United States Constitution to prevent the State, through its municipal subdivision, from adopting this view as its public policy, then the ordinance must be upheld independently of any additional justification related to other governmental purposes.

Should the Court disagree with Appellants' position as stated above or not wish to decide the question in this case there are other adequate and independent governmental purposes traditionally associated with zoning towards which the one family zoning classification is rationally adapted. Whether these additional public purposes are deemed co-equal or subsidiary, their existence is sufficient to sustain the ordinance (*McGinnis* v. *Royster*, 410 U.S. 263).

The ordinance is justified as an expression of a public policy supportive of traditional families through residential proximity and maintainance of a family neighborhood

The Village of Belle Terre did not define what a family is. Thousands of years of Western Civilization and every other civilization have done that. Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution—executives, legislatures, courts, corporations or student fraternities. If any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law it is most certainly the family.

The desire to assure housing for families is in itself a legitimate state interest. In the fulfilment of certain social preferences the state may recognize certain classes of citizens as appropriate subjects of preferential treatment. Familiar examples in the housing area are low income persons and the elderly. Even the plaintiffs themselves constitute a group whom the state has seen fit to endow with preferential housing accommodations not open to other individuals or groups. It should occasion no wonder, then, that the family, an entity already recognized with special entitlements in so many areas of the law, should commend itself to special consideration in the context of access to housing.

The family character of Belle Terre was not the result of any master plan. As the District Court found: "It is not claimed that the village was, as it were, gerrymandered into existence so that it could be a single-district village." (J.S. 76a). And as Judge Timbers stated in his dissent below:

> "The Belle Terre ordinance apparently was enacted for the purpose of zoning for a particular neighborhood character in a community that had always been of that character. The development decision was made over a period of time by the families moving into the village. The zoning ordinance therefore merely reinforced the sum of many individual choices. See Mandelker, Managing Our Urban Environment 707 (2d ed. 1971)" (J.S. 35a).

At least in the case of a small outlying Village there is nothing irrational in believing that the proximity of families with children to other families with children promotes interrelationships among both adults and children mutually beneficial to all concerned. Of course, there are more tangible justifications in terms of community stability, control of rental values and the problems of density. These will be discussed separately and also have their bearing on the family character of the neighborhood. But the simple public policy of supporting the welfare of family organization through residential proximity is within the state police power. It rests by and large on imponderables that are intuitively perceived rather than empirically demonstrated, but is nonetheless valid on that account (see the discussion of unprovable assumptions in *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628 at 2637).

To say, as did the Court of Appeals, that "such a goal fails to fall within the proper exercise of state police power" (J.S. 18a) is simply an unjustified *ipse dixit* thoroughly out of line with the favored legal status of families generally and the appropriate reach of judicial power over legislative judgments. This is a large and still diverse country, with

provincial villages as well as sophisticated cities; and we do well to remember the words of Justice Holmes:

> But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
>
> (*Lochner* v. *New York*, 198 U.S. 45, 76).

And as the great Justice said in another case:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its obstensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*
>
> (*Otis* v. *Parker*, 187 U.S. 606, 608-09).

We recognize as valid and do not seek to avoid in any way the force of this Court's observation in *Moreno* that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (93

S. Ct. 2821 at 2826). But there is a difference between a governmental desire to confer a benefit on families and a desire to penalize unrelated groups.

The law books are filled with instances of the privileges, bounties and protections with which, as Judge Dooling put it, "the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws." (J.S. 74a).

If one of those bounties is the creation of single family zoning districts within large cities and towns or, as here, the incorporation of tiny family villages within larger township units, there is nothing unusual or discriminatory in the existence of the sheltered and tranquil family environment so created. This constitutes a legal benefit and preference for family organization and is justified as one among many applications of state solicitude. Clearly, the solicitude toward the family cannot be construed as hostility towards other land uses. Judge Dooling so concluded in stating: "The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac. 2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged." (J.S. 80a). This conclusion is demonstrably applicable to this case, in which Belle Terre is but a tiny outpost in the Town of Brookhaven (population 250,000) which has several zoning districts, even the highest of which, as the District Court determined, would permit the students' domestic arrangement (J.S. 58a).

Insofar as the ordinance may embody a governmental preference for the family as such the question may arise: How is the allowance for two unrelated persons to be accounted for? Why allow any? Of course, this approach amounts to faulting the ordinance because it seems unaccountably generous in light of the suggested purpose. Whether an inconsistency in the direction of greater permissiveness would be of constitutional significance is doubtful. Yet it is appropriate to discover some basis in reasonable public policy to save the law from even this charge of inconsistency.

First, to think of the family as a group of persons related by blood, adoption or marriage naturally leads to the case of a single individual living alone. Is he a family? Whether he is or not can be a matter of definition. In any event the idea of telling the owner of a house that he cannot occupy it alone is ridiculous. Clearly, the draftsmen of the ordinance may and should make provision for the right of a single occupant of a house. Having recognized this much, might a reasonable legislator go a step further? It requires no great insight or experience with human character to realize that few people like to live solitary lives. And so the draftsmen may take the extra step and make allowance for a co-occupant.

Beyond this point the various public purposes dictating a limit on unrelated occupancy of one family houses may be seen to outweigh countervailing interests.

Insofar as the ordinance serves to regulate car ownership and traffic hazards, especially in respect of children, the provision for two unrelated persons approximates the normal use of cars by families. The two person limit also

serves the purpose of equalizing the competitive position of families and unrelated groups in bargaining for rental of houses. Few families have more than two wage earners. Lastly, the figure two is close to the average size of families in Belle Terre (three). In sum, if the Village's power to distinguish between families and unrelated groups be admitted in principle, the legislative limit of two unrelated persons is as appropriate to the relevant purposes as any other that could be suggested. It is a matter of wisdom not power and a determination as to which the Village is entitled to some flexibility.

The ordinance is rationally adapted to the zoning purpose of controlling density and related problems of intensity of land use

Were no distinction to be drawn between a genuinely related family versus unrelated individuals desiring to dwell together as a sort of residence club, the zoning objectives of density control, preservation of neighborhood character, and control of such land use intensity problems as traffic would be frustrated. These objectives form not only a rational basis for zoning but part of its essential reason for being (Anderson, American Law of Zoning, Sections 7.01, 7.06, 7.08).

In the absence of a distinction between blood relatives and others, the Courts have quite properly construed zoning ordinances strictly against the municipality and in favor of the property owner. For example, in New York, although the Appellate Division, Second Department, has held that 23 college students living together did not constitute a family (*Schenectady* v. *Alumni Assn.*, 5 App. Div. 2d 18, 168 N.Y.S. 2d 754, the Third Department has held that 60 students living together constituted a family (*Application*

of Laporte, 2 App. Div. 2d, 710, 152 N.Y.S. 2d 916, *aff'd*, 2 N.Y. 2d 921 Other jurisdictions have experienced similar difficulties with open-ended definitions of "family" (*Robertson* v. *Western Baptist Hospital*, 267 S.W.2d 395 (Ky.), (20 nurses sharing one residence held to be a family). Indeed, the unlimited number of strangers who might live together as a "family" under an Illinois ordinance resulted in the Court striking down the ordinance's prohibition on multiple dwelling units within a building. If numerous strangers may live together it is arbitrary to prevent them from living separately, (*Harman* v. *City of Peoria*, 373 Ill. 594, 27 N.E. 2d, 525).

Thus, it may be seen that a municipality's right to regulate boarding house uses and other density problems is meaningless without some restriction on the number of unrelated individuals who may live together in a dwelling. The fact that no numerical limit is imposed upon the number of blood relatives who may constitute a family does not introduce an irrational or discriminatory distinction. The number of children, brothers, uncles, grand-parents or other relatives who may be added to the conventional family unit tends to be self-limiting. This fact, together with a laudable wish not to intrude on a valued social institution accounts for the absence of a numerical limit on conventional family occupancy. No self-limiting factor, no built-in institutional restraint applies to communal living by unrelated individuals. To the contrary, the property owner's profit motive pushes strongly in the other direction.

Moreover, in the case of unrelated groups, greater density, especially of individuals leading separate lives, means increased land use intensity, such as parking and traffic.

The increase in traffic is particularly of concern to a family community in which children play and ride bicycles in the roads. The importance of density control as a prophylactic measure is particularly important to a small Village such as Belle Terre which lacks the corps of public employees necessary to regulate traffic directly.

The ordinance is rationally adapted to preventing the escalation of rents beyond family means through the superior bargaining power of unrelated groups

It seems obvious to us that a group of unrelated wage earners (or students, each with separate financial resources) pooling their purchasing power can constitute potentially destructive competition in the rental housing market against families, which have one, or at most, two, incomes.

The vulnerability of families to the progressively superior bargaining position of unrelated groups united in bidding for available houses is a problem which has occupied the attention of Courts and commentators.

(*See* Cope, Zoning: The Definition of "Family", 62 Ill. Bar Journal 80 (1973)).

Only in New Jersey has an ordinance such as that involved here been held unconstitutional.* It is worth noting the Court's reasoning because it bears on the rent escalation question and departs greatly from this Court's position on economic regulations.

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* Plantiffs' reliance on the Illinois case of *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116, is misplaced. The ordinance was invalidated on a state law ground of ultra vires. The Court expressly left open the constitutional question. The Illinois legislature has since overturned the Trottner holding. See Ill. Rev. Stat. 1969, Ch. 24, sec. 11-13-1, restoring local power to classify "family" in terms of blood, marriage or adoption.

In *Kirsch Holding Co.* v. *Borough of Manasquan*, 59 N.J. 241, 281 A.2d 516, the Court viewed the limitations on "family" as directed primarily at seasonal rentals to persons who were ill-behaved. With such an assumption, the Court concluded that direct police regulations of obnoxious behavior were the only permissible way to deal with the evil. The Court relied on and adopted the earlier lower court case of *Gabe Collins Realty, Inc.* v. *City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div.), which, in voiding an ordinance identical to that of Belle Terre, reasoned:

> "The economic stake of the plaintiff in freedom from the restriction of the ordinance is that, by and large, greater rentals can be realized from groups than from normal families usually having only one wage-earning head." (271 A.2d at 431).

It is precisely this factor of escalating group rentals rendering family occupancy uncompetitive which constitutes one of the evils the zoning law seeks to preclude. Surely, we have outlived the era of substantive due process in which the economic interest of the property owner overrode the public right to promote the general welfare. It is now established that where public health, safety or welfare is served by a zoning requirement the economic injury to a property owner does not render the ordinance invalid (*Nattin Realty Inc.* v. *Ludewig*, 67 Misc. 2d 828, 324 N.Y.S. 2d 668), unless it deprives the owner of all beneficial use (*Salamar Builders Corp.* v. *Tuttle*, 29 N.Y. 2d 221), a situation not even approached in this case, (*Best* v. *Zoning Board*, 393 Pa. 106, 141 A.2d 606).

Even the Court in *Kirsch recognized* this fact:

> "From the owner's point of view, this type of (group) rental is a financial bonanza. He will have only one letting for the entire season, and by reason of group participation in the rental, he can secure a much higher return than a conventional family is willing or able to pay." (281 A.2d at 515).

In contrast to the New Jersey Courts, which apparently view such economic disparity as an argument for the property owner, the Village agrees with *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908 (N.D. Calif.) that this economic picture constitutes one of the rational bases justifying the ordinance.

The same economic pressures noted by the courts and writers exist in Belle Terre. Two houses directly opposite the Dickman house, one a four bedroom and the other a six bedroom house previously rented for $350.00 per month (A 48-49). The Dickmans rented the house herein to the students for $500.00 per month (A 34). Small wonder that the Dickmans in their affidavit stated "It is in our economic interest to continue to rent to them [the students]." (A 37).

Plantiffs attempt to meet this justification by arguing that the Village's interest in controlling rents can be more narrowly secured by the adoption of rent controls. The Court of Appeals accepted this argument (J.S. 22a). There are three solid reasons why this position is untenable.

First, there was no proof by plaintiffs that the Village in fact had the option of adopting rent controls. The Village Law does not specifically include this within home rule and the State legislature has enacted vacancy decontrol legislation that supersedes local authority (N.Y. Consolidated Laws §§ 8605 (McKinney Supp. 1972)).

Second, it is quite reasonable for a municipality to refrain from the kind of rigidity associated with rent freeze or other forms of direct control. The Belle Terre ordinance permits the free play of market conditions to determine rental values among families (and two unrelated wage earners) while precluding the more destructive competition posed by larger numbers of independent wage earners united in bidding for a single family residence. This kind of limited *laissez faire* constitutes a legitimate economic attitude and renders unnecessary the kind of bureaucratic superstructure unsuited to a tiny political unit such as Belle Terre.

Third, and most fundamental, the kind of shopping for alternatives engaged in by the Court of Appeals at plaintiffs' urging is an inadmissible intrusion by the judiciary into legislative prerogative. Since it has been recognized by both case law and in the literature that one-family zoning indirectly keeps a control on escalating rents (in addition to its other justifications) that should be an end to the matter. The rational relation is established.

The ordinance is rationally adapted to minimizing transiency and promoting community stability

In Book V of the *Laws* Plato says "for there is no greater good in a state than that the citizens should be known to one another." (see The Portable Greek Reader, W. H. Auden ed. p. 547). In modern terms this is a desire for stability in a community. While this desire is unattainable in a City it is within the grasp of a tiny Village such as Belle Terre. The belief that transiency is incompatible with a family residential neighborhood underlies the familiar exclusion of hotels and boarding houses from one family residential zoning districts. No decision that we know of

disputes the legitimacy of stability as a goal of zoning. Plaintiffs did not dispute it below and the Court of Appeals itself said: "We are further asked to speculate that 'voluntary' families would pose greater parking, traffic and noise problems than would traditional families and that there would be a greater degree of transiency on the part of the former than the latter, thus weakening the stability of the community." (J.S. 20a). The Court then admitted: "If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power." (J.S. 20a) Yet both the District Court and the Court of Appeals rejected the justification, the latter holding: "To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed." (J.S. 20a-21a)

The Court of Appeals' misuse of the doctrine of judicial notice and its disregard of the presumption of constitutionality can only be due to an unawareness of the difference between adjucative facts and legislative facts. Or possibly it is an aspect of the hybrid scope of review invented in the present case. In any event it totally disregards bedrock doctrine of this Court. The question is not whether the lawmakers can prove the legislative facts upon which they proceeded in enacting the statute or ordinance; but whether the challenger can demonstrate "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Euclid* v. *Ambler Realty Co.*, 272 U.S.

365, 395; Accord. *McGowan* v. *Maryland*, 366 U.S. 420; *Dandridge* v. *Williams*, 397 U.S. 471; *Lindsey* v. *Normet*, 405 U.S. 56; *San Antonio Indep. School Dist.* v. *Rodriguez*, 93 S. Ct. 1278).

In addition to the error of commission discussed above, it is interesting that the Court of Appeals omitted the transiency-community stability justification from its catalogue of matters not proved or judicially noticed. It simply ignored the point in its own discussion and quoted a longer passage from the District Court opinion, the relevant part of which says: "But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined." (J.S. 21a)

This quotation from a passing reference in the District Court's opinion constitutes the entire treatment the Court of Appeals gave to this rational basis supporting the constitutionality of the Village ordinance. Since this is all there is, let us examine it in light of what this Court has held, many times over, regarding the validity of legislative classifications. Must a legislative perception of characteristics calling for different classification reflect a "universal truth"? Does the fact that *not all* family groups have internal stability disentitle local law making bodies from acting on the general run of cases? Clearly no such mathematical perfection is required. Great latitude is allowed. Rough approximations are permitted. As this Court stated in *McGowan* v. *Maryland*:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently

> than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . (366 U.S. 420, 425-26)

Numerous cases are in accord (*e.g.*, *Lindsley* v. *Natural Carbolic Gas Co.*, 220 U.S. 61; *Dandridge* v. *Williams*, 397 U.S. 471).

In light of the proper scope of review of legislative power to classify, it is not unreasonable to conclude that families tend to have greater stability than voluntary associations of individuals. Our history furnishes many examples of utopian community experiments. Many of these bands of people initially started out with strong bonds of religion or ideology holding them together. Many afforded a great measure of individual privacy into which to retreat when irritation, disagreement and other unsociable impulses threatened to dominate. Yet the history of these communities has been dissolution and failure. (Fogarty, American Utopianism (1972); Roberts, The New Communes: Coming Together in America (1971)).

How much more vulnerable to centrifugal forces are a group of students living cheek by jowl in a single family house, with no binding tie beyond the desire to occupy the house that brought them together in the first place. In point of stability there is no comparison with the traditional family whose emotional, biological and legal ties need no elaboration. The difference is not only rationally arguable;

it is manifest. We submit that the ordinance is rationally adapted to the legitimate public purpose of maintaining community stability for the benefit of the adults and children of Belle Terre.

POINT IV

The Zoning Ordinance has no relation whatever to the right to travel.

The argument based on the right to travel is wholly without support in the decisions of this Court and if accepted would constitute a *deus ex machina* to invalidate any state regulation of a local activity. Each and every case involving this right has been one where the state directly predicated some right or benefit on the applicant's duration in the state (*Shapiro* v. *Thompson*, 394 U.S. 618 (residency requirement for welfare); *Dunn* v. *Blumstein*, 405 U.S. 331, (voting residency requirements); *Cole* v. *Housing Auth. of Newport*, 435 F. 2d 807 (1st Cir.) (residency requirement for public housing)).

In the present case, there is no connection between the number of unrelated individuals who may occupy property as a family use and the duration of their residency or where they came from. It is little short of frivilous to isolate some purely local activity which is prohibited by law and link it up with the right to travel by postulating a deterrent effect on the travel of persons who might want to enter the Village to perform the prohibited act. In such fashion could all legal prohibitions be said to indirectly infringe on the right to travel of those living elsewhere who would like to come to a municipality to engage in the illegal activity. If the pro-

hibition is one which the Village has the right to enact, then the desire of nonresidents to come in and violate the prohibition adds nothing to the constitutional argument.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals be reversed and the case remanded with a direction to dismiss the complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

Opinions and Orders Below

The opinion of the Court of Appeals for the Second Circuit (JS 1a-50a),* together with two opinions issued upon denial of rehearing *en banc,* is reported at 476 F.2d 806.

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* Hereinafter, references to "JS" are to the Jurisdictional Statement. References to "A" are to the joint appendix.

The original opinion of the District Court for the Eastern District of New York (JS 51a-80a) has not been officially reported. The District Court order issued on remand, pursuant to the above-mentioned decision of the Court of Appeals, appears at JS 83a. The Court of Appeals order (JS 81a) affirming this District Court order is the judgment from which the instant appeal was taken.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The final judgment of the Court of Appeals was filed May 1, 1973. Notice of Appeal (JS 86a) was filed with the Court of Appeals, May 17, 1973. The appeal was docketed by the filing of a jurisdictional statement July 27, 1973, and this Court noted probable jurisdiction October 15, 1973.

Question Presented

Whether the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residence by more than two persons who are not related by blood, adoption or marriage, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

At issue in this suit is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families

consisting of any number of persons related by blood, adoption or marriage, from occupying a residence within the Village of Belle Terre, which is zoned entirely for "one family" occupancy.

Appellees Edwin and Judith Dickman own a house in the suburban municipality of Belle Terre which is located in Suffolk County, New York. At the time this suit was commenced, Appellees Boraas, Parish and Truman were tenants of the Dickmans. They lived in the Dickman house along with three other persons. All six tenants were students at the State University at Stony Brook, which is approximately a fifteen minute drive from Belle Terre. The leasehold arrangement between the Dickmans and the students was to expire on May 31, 1973, but was extended beyond that date (JS 52a-53a).*

None of the student occupants of the Dickman house was related to any of the others by blood, adoption or marriage. Under the living arrangement they evolved, each occupied a single bedroom and paid a portion of the rent. The six were organized and functioned as a single housekeeping unit insofar as they used the common kitchen facilities, dined together and shared housekeeping, "yard" chores, and a "house" checking account from which disbursements for necessary household expenses were made (JS 32a). It is conceded that all of the occupants behaved in a responsible manner, and no immoral or disorderly conduct on their part has been suggested (JS 3a).

Boraas, Parish and Truman each came to the Dickman house after extensive individual searches for accommoda-

* The statement of changed circumstances pending appeal set out in Appellants' Brief at 8 is accurate and reflects the situation as of the date of this brief.

tions in the Stony Brook vicinity. Each found that rents were prohibitive for the few apartment units which were available and that only dormitories on campus or cooperative residences like that which they evolved in the Dickman house were financially feasible. Moreover, each of the student Appellees found the arrangement in the Dickman house to afford an attractive, convenient and congenial residential life style—and one which afforded a useful forum for scholarly exchange (JS 3a).

The Building Zone Ordinance of the Village of Belle Terre restricts the use of land in the village to single family houses, and further, restricts the actual occupancy of each house to a single family. "Family" is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family." Article I, Section D-1.35a (JS 4a).

The Village of Belle Terre contains approximately 220 single family houses, occupied by about 700 people (JS 2a). Belle Terre is essentially fully developed (see n. 51, *infra*), with these houses spread over the Village's total area of approximately one square mile (or 640 acres). There are no industrial, commercial or institutional facilities in the Village (A48).

On June 8, 1972, Boraas and Truman were denied residents' beach permits because they were regarded by a Village official as "illegal residents," and as such not

entitled to use of the Village beach. On July 19, 1972, the Dickmans, the owners-lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village had failed to comply with the procedural requirements of its ordinance, in that no notice of violation had been served, the summons was withdrawn. On July 31, 1972, the Dickmans were served with an "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972 (JS 4a).

On August 2, 1972, this action was commenced in the United States District Court for the Eastern District of New York, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption or marriage." Pending a hearing on the constitutional issues, District Judge John F. Dooling, Jr. issued a temporary restraining order. Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 denied the motion for a preliminary injunction and upheld the validity of the ordinance (JS 51a).

Plaintiffs appealed the denial of the preliminary injunction to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, *inter alia,* that "[t]he discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives" (JS 25a). Accordingly, the Court of Appeals reversed the order of the District Court and remanded the

matter for further proceedings.* On remand to the District Court, and upon all the papers and proceedings heretofore had herein, and upon the oral representations made to the Court by the parties, to the effect that neither party intended to supplement the evidentiary record, District Judge Dooling entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement (JS 83a). The Village of Belle Terre appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973 (JS 81a). It is from this judgment that the Village of Belle Terre and the individually named defendants appealed.

Summary of Argument

Absent a finding that some stricter standard of review is appropriate, legislative classifications challenged under the Equal Protection Clause must be shown to be "rationally related" to a legitimate governmental interest. The interests upon which the Village of Belle Terre relies as justifying its exclusion of unrelated households fall under two heads: first, the Village candidly acknowledges that it wants to effectuate the social preference of its residents for neighboring households comprised of traditional families; second,

* Prior to remand, a poll of the judges in regular active service was taken as to whether this action should be reheard *en banc*. The request for rehearing *en banc* was denied, four judges dissenting (JS 41a).

the Village asserts more traditional zoning interests, to wit, regulating density of population, controlling rents, and reducing transiency.

I.

The desire of the residents of Belle Terre to exclude households which they regard as uncongenial is not a legitimate governmental interest. The pursuit of such an interest is at drastic odds with the rights of travel and privacy, and more broadly, with the guarantees of personal freedom and limitations upon state action in the first section of the Fourteenth Amendment. Moreover, even if it is within the power of the state to create socially homogeneous enclaves, it is impermissible for a single municipality like the Village of Belle Terre to undertake to make such an enclave of itself.

II.

No legitimate interest of government is rationally related to the contested ordinance. An examination of the "traditional" interests with which the Village seeks to justify the challenged ordinance indicates that these are not actual concerns of the Village, and that the empirical connection between the ordinance and these interests is wholly unsubstantiated, and in some respects starkly contradicted by the available data. When the primary purpose of an enactment is illegitimate, attempts to "sanitize" the classification by adducing hypothesized legitimate interests should be rebuffed.

III.

The Belle Terre ordinance impinges upon the fundamental rights of privacy and travel. Accordingly, it is appropriately judged by the rigorous standards of the compelling state interest test. Alternatively, it should be measured against the evolving intermediate standard of review. In either event, some form of the "less drastic means" principle is appropriate. Viewed through the lens of that principle, the "traditional" interests advanced by the Village cannot possibly justify the challenged ordinance.

ARGUMENT

Introduction

Forty-seven years ago, in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court sanctioned comprehensive land use regulation as a valid exercise of the police power. Since *Euclid*, the Court has only infrequently had occasion to consider cases involving municipal zoning enactments.[1] On those occasions, it has consistently reaffirmed the general propriety of governmental undertakings directed towards the segregation of incompatible uses of land and the facilitation of the productive use and enjoyment of land. The *Euclid* decision has spawned the almost universal acceptance of comprehensive municipal zoning in the United States.

But the power to place restraints on the use of land is, like all governmental power, susceptible of abuse. And even before the enactment of the first comprehensive zoning law in the United States, the capacity of the state to regulate land was perverted by sporadic municipal efforts to exclude persons who were regarded as undesirable from the use of land.[2] Municipal ordinances have been employed in attempts to separate white and black citizens,[3]

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[1] See *Gorieb* v. *Fox*, 274 U.S. 603 (1927); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928); and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928).

[2] See, e.g., *In re Lee Sing*, 43 Fed. 359 (C.C.N.D. Cal. 1890).

[3] See pp. 35 to 37, *infra*.

to keep out families with children,[4] keep out the old,[5] keep out the young,[6] and keep out the physically and psychologically infirm.[7] In those relatively rare instances when such enactments have surfaced, courts at all levels have been quick to invalidate them, whether the exclusion has been patently invidious, as in racial zoning ordinances, or seemingly benign, as in the case of ordinances which reserve neighborhoods for elderly citizens.[8] The broad judicial tolerance of zoning restraints has been withdrawn in the face of such abuses.

The ordinance challenged in this action not only purports to say who may and who may not live in the Village of Belle Terre, it seizes upon a criterion of exclusion which is based upon the deeply personal choices of individuals to live together in a common household. To the residents of the Village, the prospect of sharing their community with a household of persons not related by blood, adoption or marriage was apparently offensive. Without more, this would be a matter of personal taste. But when the officials of the Village project these social preferences into law, it becomes a matter of serious constitutional concern. The burden of the argument which follows is that the Belle Terre ordinance, like the barracks of Sparta, is founded upon a view of the "relation between individual and state" which is "wholly different from [that] upon which our institutions rest." *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923).

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[4] See note 11, *infra.*

[5] See note 12, *infra.*

[6] See p. 40, *infra.*

[7] See note 12, *infra.*

[8] See p. 40, *infra.*

I.

The social preference of the residents of the Village of Belle Terre for neighboring households comprised of families is not a legitimate interest of government, and cannot be proffered as justification for the challenged ordinance.

A. *The Nature of the Issue.*

Central to the decisions of the District Court and Court of Appeals below was the question whether the social preference of families residing in a municipality to associate only with other families could be the basis for an ordinance which excluded households of persons not related by blood, adoption or marriage. The District Court rested its judgment on an affirmative resolution of this question.[9] The Court of Appeals, however, firmly rejected the view that residents of a community are entitled to project their social preferences into law and, on the basis of such preferences, to justify the exclusion of any residents who would disrupt the homogeneous residential environment of their community:

> "Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely, the interest of the local community in

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[9] "The threshold question then becomes, whether there is any legally protectable affirmative interest in the establishment of even one such zoning district of marriage-and-blood-related families living in single-family dwelling houses. Such a zoning ordinance as Belle Terre's of itself indicates the existence of an interest on the part of such families in establishing a place of association to the exclusion of all other kinds of land uses ...." (JS 73a-74a).

the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare" (JS 18a).

• • • • •

"The effect of the Belle Terre ordinance would be to exclude from the community, without any rational basis, unmarried groups seeking to live together, whether they be three college students, three single nurses, three priests, or three single judges. Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community 'Admissions Committee.' While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public" (JS 19a).

The burden of this portion of the Appellees' argument is that the conclusion of the Court of Appeals below is

well founded. In advancing this claim, it is useful to consider the nature and rationale of a determination that a given purpose or goal is not a proper or legitimate interest of government.

The starting point for constitutional analysis of governmental classifications is the identification of a legitimate governmental interest which is advanced by the challenged enactment. If no such interest can be identified, the classification must fail as violative of the Equal Protection Clause, and the inquiry need proceed no further. See, e.g., *Reed* v. *Reed,* 404 U.S. 71 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); and *United States Department of Agriculture* v. *Moreno,* 93 S. Ct. 2821 (1973). Necessarily, there are limits to the interests which governmental entities can properly pursue, limits which flow from the Constitution. While the guarantees of liberty in the Constitution are framed in terms of protections afforded individual citizens, they also serve to limit the range of interests which can legitimately be sought by government.

Thus, the Equal Protection Clause itself voids of legitimacy a governmental purpose to injure any discrete group. See *United States Department of Agriculture* v. *Moreno, supra,* 93 S. Ct. at 2826. Were this not the case, the guarantee of equal protection of the laws would have no meaning at all. Similarly, a governmental restriction on public expression could not be justified on the grounds that "public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). Recognition of such a purpose as proper would conflict with the essence of the First Amendment's guarantee of freedom of expression. And thus, a restriction on, or impediment to, the in-migration of persons from other states could not

be validated on the ground that it advances the interest of the state in excluding certain classes of persons from assuming residence. *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969); *Edwards* v. *California*, 314 U.S. 160, 173-74 (1941). Such an objective does violence to the precepts of the right to travel.

The personal freedoms assured in the Constitution embody root perceptions of society. When a given objective of government is itself at fundamental odds with these constitutionally enshrined perceptions, it cannot be proffered as justification for governmental activity. Governments cannot seek to accomplish ends which are the very negation of constitutionally secured rights. See *Shapiro* v. *Thompson, supra*, 394 U.S. at 631.

The questions of whether an asserted interest of government is legitimate and whether a right secured by the Constitution has been abridged are related but significantly different and may be resolved independently. If the only interests advanced by a governmental classification are illegitimate, it fails and there is no need to ask whether the classification abridges a specific protected freedom. For example, without reaching the question of whether persons have a constitutionally protected interest in communal living, the Court has determined that it is not a legitimate interest of government to injure persons who decide to live in this fashion. See *United States Department of Agriculture* v. *Moreno, supra*, 93 S. Ct. at 2826. Similarly, in the instant case, it is possible for the Court to consider Appellees' contention that the goal of household uniformity in the Village of Belle Terre is not a legitimate interest of government without reaching the broader question of

whether any substantial interference with the right of unrelated groups to live in a community impinges upon constitutionally protected rights.

Inquiry into an unrevealed, disputed governmental purpose is not always appropriate. Compare *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 461-62 (1972) (Burger, C.J., dissenting), and *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 488-90 (1972) (Burger, C.J., concurring), with *Palmer* v. *Thompson*, 403 U.S. 217 (1971). But when a governmental entity asserts that its actions are prompted by a given interest and relies upon that interest for justification of its actions, judicial evaluation of the constitutional validity of the professed interest is appropriate; indeed, it is essential.

To this point, Appellees have intended only to demonstrate the propriety of judicial inquiry into the legitimacy of governmental interests which are advanced in support of challenged legislation. What follows is Appellees' support for the conclusion of the Court below that the desire of the Village of Belle Terre to exclude persons whose household arrangements were perceived as uncongenial is not a legitimate governmental interest. In this regard, Appellees' argument in support of the conclusion reached by the Court of Appeals is fourfold: first, that the projection of such local preferences into law is inconsistent with the right to travel and thus is not a proper goal of government; second, that it is inconsistent with the right of privacy and thus is not a proper goal of government; third, that the use of the coercive power of the state to effectuate these social preferences is at drastic odds with the "Fourteenth Amendment's concept of personal liberty and restrictions

upon state action;"[10] and fourth, that even if, *arguendo*, a state may undertake to create socially homogeneous residential enclaves, no single community like the Village of Belle Terre can unilaterally undertake to make of itself such an enclave.

B. *The Desire to "Fence Out" Socially Undesirable Persons or Households From a Municipality Is Inconsistent With the Right to Travel and Is Therefore Not a Legitimate Interest of Government.*

The assertion that the families who reside in the Village of Belle Terre can use the coercive power of the state to advance their preference to be surrounded exclusively by other families is novel and deeply disquieting. If families may exclude those who live together but are unrelated, then presumably a community in which families with children predominated could exclude childless households; a largely childless community could exclude families with children.[11] In like fashion, communities of the young could exclude the aged or the infirm;[12] older citizens could un-

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[10] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

[11] At least one community, in New Jersey, actually has an ordinance which limits occupancy in multiple dwellings to one preschool-age child per dwelling unit and forbids occupancy by school-age children. See Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 Syr. L. Rev. 475, 488 n. 24 (1971). But see *Molino* v. *Mayor & Council of Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971) (Bedroom limitations on apartments invalidated).

[12] In *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932), the City's defense of an ordinance excluding an old age home in an extant residential structure was bottomed, in part, on the view that "wheeled chairs and invalidism are ever present . . . that such settings are not conducive to the happiness of the people who live in the residence district and

dertake to secure their own communities against the influx of the young;[13] college educated persons could create enclaves for themselves; or, as the Court of Appeals below suggested,[14] communities could establish admissions committees to pass on the fitness or congeniality of prospective residents. The vision which emerges is that of a society divided by law into a congeries of socially homogeneous enclaves.

Such a vision is drastically incompatible with the right to travel. That right, firmly established as fundamental to our constitutional precepts, see *United States* v. *Guest*, 383 U.S. 745 (1966), *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), includes in its most crucial extent the right to migrate and settle. See *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 629, and *Dunn* v. *Blumstein*, *supra*, 405 U.S. at 338.[15] Communities which seek to exclude those persons whose pres-

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cause gloom to cloud an otherwise peaceful existence." 58 F.2d at 602. The Court of Appeals invalidated the ordinance. See p. 38, *infra*.

The City of Long Beach, New York, recently attempted to exclude the physically or psychologically infirm by prohibiting all hotels, boarding and rooming houses from registering persons who require continuous psychiatric, medical or nursing services, and from providing any of these services to residents. An establishment not complying with these provisions cannot be licensed. Ordinance No. 1195/73, amending Municipal Code of the City of Long Beach, ch. 5, §1, by adding art. 7 (Dec. 27, 1973).

[13] Senior citizen districts have been instated in a few communities. Where challenged, they have been struck down. See p. 40, *infra*.

[14] See p. 12, *supra*.

[15] In both *Shapiro* and *Dunn*, the concern is clearly with the penalties borne by the person who has recently assumed residence in a community. Neither welfare benefits nor the franchise are plausibly the due of the transient who is "passing through" a

ence is offensive are interfering in the most direct fashion possible with the exercise of this right. Unlike *Dunn* and *Shapiro*, where the person who resettles is merely penalized by the denial of perquisites available to long-term residents, this sort of exercise of the zoning power denies the very right of settlement. In this respect, municipal ordinances founded upon the purpose of maintaining a particular social milieu are most nearly like the state law invalidated in *Edwards* v. *California*, 314 U.S. 160 (1941); that law deterred indigents from assuming residence in the state by penalizing those who knowingly assisted in their migration. But this sort of ordinance, by directly prohibiting occupancy, goes still further.

In *Edwards* v. *California, supra*, the Court held that the purpose of prohibiting "the transportation of indigent persons across the California border" is not a legitimate interest of the state. 314 U.S. at 173-174. And in *Shapiro* v. *Thompson, supra*, the Court held that "the purpose of inhibiting the migration of needy persons into the State is constitutionally impermissible." 394 U.S. at 629. The mu-

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place. In *Cole* v. *Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir. 1970), Judge Coffin found as follows:

> "The Court [in *Shapiro*] apparently uses 'travel' in the sense of migration with intent to settle and abide. *See* Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U. L. Rev. 989, 1012 (1969). Thus, laws that comparatively disadvantage persons traveling to take advantage of state benefits and then leaving are permissible under *Shapiro*. . . . A resident of Maine vacationing for a month in New Hampshire might be penalized for traveling if he could not obtain the benefits of a library card in New Hampshire during his vacation. Nevertheless, a residency requirement so 'penalizing' that kind of travel is probably permissible under *Shapiro*." 435 F.2d at 807 (footnotes omitted).

See also *King* v. *New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971).

nicipal purpose of excluding persons who are perceived as uncongenial to the present residents of the community can surely fare no better.

The foregoing assumes, however, that the right to travel includes the right to migrate and settle within a state as well as between states. While the Court has only considered and delineated the contours of the right in the interstate context, there are compelling reasons for extending the analysis to embrace the intrastate circumstance as well. The claim for limitation of the right derives, presumably, from its association with the Commerce Clause. See *Edwards* v. *California, supra,* and the *Passenger Cases,* 7 How. 283 (1849). But in *Shapiro* v. *Thompson, supra,* the Court specifically eschewed reliance upon any particular provision of the Constitution in framing the right to travel, noting that it had been ascribed as well to the Privileges and Immunities Clause of Art. IV, Section 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth Amendment. 394 U.S. at 630, n.8 & text.

It would do implausible injury to the "constitutional concepts of personal liberty," which are the predicate of the right to travel, *Shapiro* v. *Thompson, supra,* 394 U.S. at 629, to construe that right as assuring migration to and settlement within a state for persons coming from without that state, while permitting drastic curbs on movement and settlement wholly within a state.[16] The Courts of Appeals for the First and Second Circuits have specifically rejected this result, holding that the right to travel applies in its full extent to the claims of those who wish to make their homes in specific communities. *King* v. *New Rochelle Municipal Housing Authority,* 442 F.2d 646, 648 (2d Cir.

[16] See Freund, *Police Power* 529 (1904).

1971); *Cole* v. *Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir. 1970). See also *Valenciano* v. *Bateman*, 323 F. Supp. 600, 603 (D. Ariz. 1971) (three-judge court); and *Demiragh* v. *DeVos*, 476 F.2d 403 (2d Cir. 1973).

The Village of Belle Terre seeks to buttress its claim that the social preferences of its residents for neighboring family households can be projected into law by noting that "families are per se legitimate objects of public concern and support" (Appellants' Brief at 25). As the Court recognized in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972), "the regulation and protection of the family unit have indeed been a venerable state concern." To acknowledge this is merely to agree that in some matters families may be given favored treatment; so, indeed, in appropriate circumstances, may other groups such as the very old, the very young, and the infirm. But to grant that the state has a special concern with the welfare of a particular group is not to grant that the state can do things on behalf of such a group that conflict with basic precepts of the Constitution, nor to suggest that such a group can have its preference for social homogeneity effectuated by the coercive machinery of the State where other groups cannot. And the Village offers no support for the belief that securing uniformity of family households in Belle Terre will protect the institution of the family.[17]

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[17] There is some suggestion in Appellants' brief that the Belle Terre ordinance supports the family by setting aside houses for families. See Appellants' Brief at 26. If the claim is that there is a shortage of homes for families within the region of which Belle Terre is a part, or even in the Village itself, there is absolutely no evidence in the record to support such a claim; indeed, there is not even an assertion by Appellants that such a need exists. If the claim is that rental units will be priced out of the

The claim of this portion of Appellees' argument is simply that the goal of preserving social homogeneity is not a proper interest of government. It is not argued that Appellees or other persons have a right to live wherever they may please; nor that zoning restraints on residential uses generally bear a special burden of justification. Rather, Appellees' position is that a community, when it limits the kind of persons or housholds who may live in those areas which it has set aside for residential uses, cannot legitimately offer as the purpose of its so doing the goal of preserving a particular social ambiance. More specifically, Appellees here argue that the legal recognition of such a goal is inconsistent with the right to travel.

C. *The Specific Desire to Exclude Persons From a Municipality Because Their Chosen Household Arrangements Are Uncongenial to the Present Residents Is Inconsistent With the Right of Privacy, and Is Therefore Not a Legitimate Interest of Government.*

Appellees' argument in Point IB of this brief, above, is directed to the proposition that social homogeneity is not a legitimate interest of government. In this section the argument is narrowed: the proposition advanced is that the particular kind of social homogeneity pursued in the Belle

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reach of families, that is a separate point made elsewhere by the Appellants and is met by the Appellees at p. 54, *infra*.

The Court of Appeals below also failed to find a rational connection between the ordinance and the institution of the family unit:

> "Even assuming *arguendo* that a social predilection in the form of entrenched traditional family units constituted a valid zoning objective, we fail to find a shred of rational support for the means used here to achieve that end. It is not suggested that appellants or unrelated groups functioning as a single housekeeping unit, endanger the health, safety, morals or welfare of existing residents of the community. The most that can be said is that they differ from existing residents solely because of lack of blood or marriage ties" (JS 19a).

Terre ordinance—that of uniformity of household organization—is beyond the scope of legitimate governmental interests, because it is at fundamental variance with the precepts of the right of privacy.

The zoning ordinance which is challenged here prohibits persons from forming households comprised of more than two unrelated individuals anywhere within the Village of Belle Terre. As a complete barrier to the decision by three school teachers, four priests, or six students to form a common household, the ordinance thoroughly upsets settled expectations and perceptions about the limits of governmental intrusion into the personal affairs of citizens. The outrage to common sensibilities which such an enactment presents is directly reflected in established constitutional doctrine assuring individuals the right of privacy. When a community undertakes to exclude certain residential households because of the kinds of choices made by the individuals in those households concerning the persons with whom they wish to live, it has exceeded the bounds of its legitimate goals as a governmental subdivision.

It is now well established that the Constitution creates "zones of privacy" into which the state may not intrude except under genuinely compelling circumstances. See, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Were it possible to map the area of personal choice protected by this right of privacy, the home would lie at or near its center; and, within the home, the

close personal associations of the individuals who lived there would in turn occupy a central position.

The home has long been considered to be a sanctuary of personal privacy. "The sanctity of a man's home" and "the privacies of life," *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 484, are closely intertwined and interdependent notions.

In *Stanley* v. *Georgia*, *supra*, the Court founded its judgment on the premise that "a state has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch." 394 U.S. at 565. In *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628 (1973), the Court underscored the importance of the home as a special and primary locus of personal privacy:

> "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." 93 S. Ct. at 2639.
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> "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home', which was hardly more than a reaffirmation that 'a man's home is his castle.'" *Id.* at 2640.
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> "The protection afforded by Stanley v. Georgia, *supra*, is restricted to a place, the home." *Id.*, n.13.

The choice as to with whom one will make his home touches upon a very crucial aspect of the right of privacy. The association of the individual partners in the marriage

relationship was the foundation of the majority opinion in *Griswold, supra,* 381 U.S. at 486. There, marriage was described as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." In *Eisenstadt* v. *Baird, supra,* the Court reiterated the associational foundation of the *Griswold* decision and indicated that unmarried individuals participated equally in the right to privacy relied upon in *Griswold.*[18] See also, *Paris Adult Theatre I* v. *Slaton, supra,* 93 S.Ct. at 2640, n.13, where the Court notes the importance to the right of privacy of a "protected intimate relationship".[19]

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[18] "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969). See also Skinner v. Oklahoma, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942); Jacobson v. Massachusetts, 197 U.S. 11, 29, 49 L.Ed. 643, 651, 25 S.Ct. 358 (1905)." *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453-54.

[19] Mr. Justice Douglas has rested the associational rights of unrelated persons living together on more explicit First Amendment grounds:

"This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one's associates for social, political, race, or religious purposes is basic in our constitutional scheme. NAACP v. Alabama, 357 U.S. 449, 460, 2 L.Ed.2d 1488, 78 S.Ct. 1163; Dejonge v. Oregon, 299 U.S. 353, 363, 81 L.Ed. 278, 57 S.Ct. 255. NAACP v. Button, 371 U.S. 415, 429-431, 9 L.Ed.2d 405, 83 S.Ct. 328; Gibson v. Florida Investigating Committee, 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889; NAACP v. Alabama, 377 U.S. 288, 12 L.Ed.2d 325, 84

Decisions concerning one's household associations are of great personal importance and sensitivity. The general quality of a person's life is closely tied to the living arrangements he or she has evolved. The kind of social, cultural and intellectual companionship which is enjoyed in a household is at the very core of the living experience of its members.[20]

More particularly, the decision whether to live with persons to whom one is related by blood, marriage, or

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S.Ct. 1302. It extends to 'the associational rights of the members' of a trade union. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8, 12 L.Ed.2d 89, 84 S.Ct. 1113.

"I suppose no one would doubt that an association of people working in the poverty field would be entitled to the same constitutional protection as those working in the racial, banking, or agricultural field. I suppose poor people holding a meeting or convention would be under the same constitutional umbrella as others. The dimensions of the 'related' persons problem under the Food Stamp Act are in that category. As the facts of this case show, the poor are congregating in households where they can better meet the adversities of poverty. This banding together is an expression of the right of freedom of association that is very deep in our traditions.

"Other like rights have been recognized that are only peripheral First Amendment rights—the right to send one's child to a religious school, the right to study the German language in a private school, the protection of the entire spectrum of learning, teaching, and communicating ideas, the marital right of privacy. Griswold v. Connecticut, 381 U.S. 479, 482-483, 14 L.Ed.2d 510, 85 S.Ct. 1678." *United States Department of Agriculture* v. *Moreno, supra,* 93 S.Ct. at 2829-31 (Douglas, J., concurring).

[20] The above proposition is particularly demonstrated by the household arrangement created by the student Appellees herein. Such an arrangement evolved not merely because it was attractive, congenial and financially feasible. In addition, the unity of interest in the study of sociology was a common factor in the experience of the student Appellees, and the living arrangement which was created in the Dickman house afforded a useful forum for scholarly exchange (A10, A20, A31, A34).

adoption is surrounded by acutely personal considerations. Assuming that there are relatives with whom a person could live, the decision may involve such considerations as whether to become independent of one's parents, to separate from one's spouse, or to live in a different home or place from more distant relatives.

It is against this background that Belle Terre's professed interest in securing household uniformity must be evaluated. The families resident in Belle Terre have opted for a criterion of exclusion which is based on the deeply personal choices of individuals who have decided to live together in a common household; and the Village proffers as justification for this enactment the desire of those families to associate only with other persons who have organized themselves into household units comprised of members related by blood, adoption or marriage, that is to say, with persons who have made the same personal choices as have they.

Individual decisions concerning the persons with whom one is to live and the arrangements by which one's household is to be maintained may well be protected by the right of privacy against governmental interference generally.[21] Even if not, they are surely protected against governmental decisions unsupported by any concern other than a feeling by persons in a community that only a narrow mold of household arrangement is socially desirable. To recognize such a preference as a valid interest of government would be to accept the direct imposition of a social predilection held by a preponderance of the present residents of Belle

[21] Appellees advance this argument at p. 60, *infra*.

Terre upon those who have made different personal choices; this would do substantial violence to the precepts of personal liberty and individual choice upon which the right of privacy is founded.

D. *The Use of the Coercive Power of the State to Effectuate the Social Preferences of the Residents of the Village of Belle Terre Is at Drastic Odds With the "Fourteenth Amendment's Concept of Personal Liberty and Restraints Upon State Action."*

The right to travel and the right of privacy are specific facets of the "fundamental" personal freedom which is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Although the exact Constitutional predicate of these rights may be still open to dispute, see *Shapiro* v. *Thompson, supra*, 394 U.S. at 630, n.8 & text, and *Roe* v. *Wade, supra*, 410 U.S. at 152-53, their general grounding in the "constitutional concepts of personal liberties" is well established. *Shapiro* v. *Thompson, supra*, 394 U.S. at 629, *Roe* v. *Wade, supra*, 410 U.S. at 152-53.

The use of the coercive power of the state to effectuate the social preferences of the residents of the Village of Belle Terre for neighboring households comprised of families is at drastic odds with our democratic tradition and the "concept of ordered liberty" which lies at its heart. Thus, the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action," *Roe* v. *Wade, supra*, 410 U.S. at 153, makes the effectuation of such preferences an improper object for the state to pursue, whether or not the more specific notions of the right to travel or the right of privacy act as barriers to such action.

The evaluation of the claim that an action by government is so inconsistent with our tradition of personal liberty as to transgress the first section of the Fourteenth Amendment is a complex, ultimately subjective task. In substantiating this claim, Appellees will advance and document two contentions: first, that the proposition that a municipality may, by force of law, restrict residential access to its community for the avowed purpose of retaining the social homogeneity of that community is antithetical to this nation's experience, ideology and self-perception as an open, egalitarian and integrated society; and, second, that the response of federal and state courts generally to zoning enactments which aim at social rather than physical compatibility in the use of land has been uniformly negative.

1. The Proposition That a Municipality May, by Force of Law, Restrict Residential Access to Its Community for the Avowed Purpose of Retaining the Social Homogeneity of That Community Is Antithetical to This Nation's Experience, Ideology and Self-Perception as an Open, Egalitarian and Integrated Society.

At the heart of our vision of America as a democratic nation are two distinct yet correlative themes: first, that ours is an open, egalitarian and integrated society; and second, that such a society is furthered and enhanced by extensive geographic mobility.

The relationship between equality, social mobility and the availability of land allowing for geographic mobility was perceived quite early in this nation's history by Alexis de Tocqueville, who observed that,

> "the chief circumstance which has favored the establishment and the maintenance of a democratic system

in the United States is the nature of the territory that the Americans inhabit. Their ancestors gave them the love of equality and of freedom; but God Himself gave them the means of remaining equal and free by placing them on a boundless continent." Tocqueville, *Democracy in America,* 301 (Vintage ed., 1954).

Tocqueville's praedial analysis of American democracy proved both perceptive and prescient. The impulse toward migration and mobility became a significant social dynamic of nineteenth as well as twentieth century America. And this migratory impulse, described by Alice Felt Tyler[22] as "dynamic democracy," significantly furthered the ethnic and cultural integration of American society and thereby facilitated opportunities for social heterogeneity.[23]

That American society has been strengthened by both its mobility and its diversity has been recognized by the chroniclers and critics, prophets and poets of American democracy. Tocqueville's observation recurs consistently throughout American historiography and social criticism.

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[22] See Tyler, *Freedom's Ferment,* 5-22 (Harper pbk. ed., 1962).

[23] The social history of America presents, of course, numerous examples where cultural and social integration was vigorously resisted and frequently feared. The experience of the black American in this country is at once the most obvious and most tragic example of the resistance to integration and the discrepancy between egalitarian ideology and social reality. See Myrdal, *An American Dilemma* (2 vols., 1944); Woodward, *The Strange Career of Jim Crow* (rev. ed., 1957).

The nativism exemplified by the Know-Nothings in the 1850's, and the American Protective Association of the 1880's, and the Populists in the 1890's also provides an unhappy example of resistance to diversity. But their views are generally recognized as inconsistent with democratic principles and values.

Ralph Waldo Emerson,[24] Henry George and Randolph Bourne[25] all found themselves within the mainstream of American thought when they expressed the virtue of diversity within a democracy and further when they saw migration and the accessibility of land as essential factors

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[24] Ralph Waldo Emerson found democratic society strengthened by the diversity within it. Emerson wrote: "The energy of the Irish, Germans, Swedes, Poles and Cossacks, and all the European tribes—and of the Africans, and of the Polynesians,—will construct a new race, a new religion, a new state, a new literature, which will be as vigorous as the new Europe which came out of the smelting-pot of the Dark Ages. . . ." Emerson, quoted in Gabriel, *The Course of American Democratic Thought* 46 (1956).

[25] The progressive movement generally recognized the benefits which cultural and attitudinal diversity bestowed upon American democracy. Eric Goldman notes that "[p]rogressives made up the dominant element in the settlement houses that were undertaking the first systematic Americanization work, and the Americanization work they advocated was no one-way street. The immigrant was not only to learn, settlement workers emphasized; he was to teach. While assimilating, he was to preserve the parts of his heritage which did not conflict with the adjustment to the United States and he was to enrich American culture by bringing to it desirable ideas or customs from his old-country background." Goldman, *Rendezvous With Destiny*, 60-61 (rev. Vintage ed., 1956).

Henry George, a leading progressive and social critic, writing *Progress and Poverty* in 1879, also commented upon American diversity and he additionally saw accessibility to land as an essential factor in the furtherance and perpetuation of democratic principles:

> "This public domain—the vast extent of land yet to be reduced to private possession, the enormous common to which the faces of the energetic were always turned, has been the great fact that, since the days when the first settlements began to fringe the Atlantic Coast, has formed our national character and colored our national thought. . . . The general intelligence, the general comfort, the active intention, the power of adaptation and assimilation, the free, independent spirit, the energy and hopefulness that have marked our people, are not causes, but results—they have sprung from unfenced land. This public domain has been the transmuting force which has turned the thriftless, unambitious European peasant into the self-reliant Western farmer; it has given a consciousness of freedom even to the dweller in crowded cities, and has been a well-spring of

in the furtherance of pluralism and the perpetuation of democratic principles.

But, perhaps the most influential articulation of the interrelationship between mobility, heterogeneity, accessibility to land and democratic ideology was that of Frederick Jackson Turner who, in 1893, presented a paper to the American Historical Association, entitled "The Significance of the Frontier in American History," which theorized that "democracy is born of free land." [28] Central to Turner's explanation of the role of the frontier were notions involving the accessibility of land and the ability to migrate. Turner contended that the "most important effect of the frontier has been in the promotion of

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hope even to those who have never thought of taking refuge upon it. The child of the people, as he grows to manhood in Europe, finds all the best seats at the banquet of life marked 'taken', and must struggle with his fellows for the crumbs that fall, without one chance in a thousand of forcing or sneaking his way to a seat. In America, whatever his condition, there has always been the consciousness that the public domain lay behind him; and the knowledge of this fact, acting and reacting, has penetrated our whole national life, giving to it generosity and independence, elasticity and ambition. All that we are proud of in the American character; all that makes our conditions and institutions better than those of older countries, we may trace to the fact that land has been cheap in the United States, because new soil has been open to the emigrant." George, *Progress and Poverty*, quoted in Hofstadter, *The Progressive Historians* 58-59 (Vintage ed. 1970).

The thematic emphasis of Henry George was on the advantages of geographic mobility. Randolph Bourne, on the other hand, extolled the virtues of cultural diversity in his essays advocating "trans-nationalism." There were of course progressives such as sociologist Edward Ross, whose hostility to cultural pluralism did not comport with the views of Emerson, George and Bourne. See Goldman, *Rendezvous With Destiny, supra*, at 60.

[28] Turner, *The Frontier in American History* 32 (1920). The address did not appear in book form until the publication of this volume. Accordingly, all citations to the Turner essay will be to this work.

democracy here and in Europe."[27] In explaining how and why this was so, Turner observed that throughout this nation's development "interstate migration went steadily on," and he described this migration as "a process of cross-fertilization of ideas and institutions."[28] Furthermore, Turner demonstrated: "... [N]othing works for nationalism like intercourse within the nation. Mobility of population is death to localism, and the western frontier worked irresistibly in unsettling population. The effect reached back from the frontier and affected profoundly the Atlantic coast and even the Old World."[29]

The Turner thesis came to be regarded, according to Richard Hofstadter, as "the closest thing we have had to a seminal contribution to the theory of American history."[30] Because Turner was able to capture "... the characteristic American view of the American past,"[31] his essay in and of itself became part of our democratic faith. Thus, whatever its factual and analytical failings,[32] the Turner thesis remains viable for its articulation of our most esteemed values relating to pluralism, heterogeneity and

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[27] *Ibid.* at 30.

[28] *Ibid.* at 22.

[29] *Ibid.* at 30.

[30] Hofstadter, *The Progressive Historians, supra,* at 136.

[31] Turner, *The Frontier in American History, supra,* at 54.

[32] Turner concededly had his critics. See particularly Wright, "American Democracy and the Frontier," 20 Yale Rev. 349 (1930); Wright, "Political Institutions and the Frontier," in D. R. Fox, ed., *Sources of Culture in the Middle West* 15-38 (1934); Pierson, "The Frontier and American Institutions," 15 New England Quarterly 224 (1942). But see also Billington, "The Frontier in American Thought and Character," in Lewis and McGann, *The New World Looks at Its History* (1963) and Billington, *America's Frontier Heritage* (1966).

egalitarianism as well as for its exposition of the highest aspirations of American democracy.

The perspective of contemporary historians and social critics, however, has advanced beyond Turner's somewhat limited focus on the Western frontier. In general, the contemporary deviation in perspective has resulted in historical and sociological inquiries into other kinds of mobility patterns and their effect on this country's institutional and social development. For example, historians Stanley Elkins and Eric McKitrick suggest that the development of American democracy is influenced "not by the 'frontier' in the narrow and constricted sense of that term, but by the whole process of moving and resettling, common to America from the seventeenth century onward, and of forming new communities." [33] Similarly, Stephen Thernstrom, in an essay describing migration from rural areas to urban communities has pointed out that "the [mobility] statistics bear out the legend that Americans are a restless people." And Thernstrom further found significant correlation between "geographical mobility, that is, physical movement from place to place, and movement through the social scale," thereby suggesting that opportunities for social heterogeneity are advanced by providing opportunities for geographic migration.[34]

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[33] Elkins and McKitrick, "A Meaning for Turner's Frontier," 59 Pol. Sci. Q. 325-30, 585-94 (1954).

[34] Thernstrom, "Urbanization, Migration, and Social Mobility in Late Nineteenth-Century America," in Bernstein ed., *Towards a New Past*, 166-168, 173 (Vintage ed. 1969); see also, Thernstrom, *Poverty and Progress: Social Mobility in a Nineteenth Century City* (1970); Curti, *The Making of an American Community* (1959); Potter, *People of Plenty* (1954); Becker, *Freedom and Responsibility in the American Way of Life* (1945).

In sum, there is a deep and common tradition running through the chronicles of our nation's democratic development. That tradition places heterogeneity and the freedom of migration high among our national ideals. The use of the coercive power of the state to create exclusive, homogeneous residential enclaves is in stark contradiction to that tradition.

2. The Response of Federal and State Courts to Zoning Enactments Which Aim at Social Rather Than Physical Compatibility in the Use of Land Has Been Uniformly Negative.

In *Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926), this Court sanctioned comprehensive local zoning as a valid exercise of the police power. The regulations which were considered and validated in the *Euclid* decision were directed towards the segregation of incompatible uses of land and the facilitation of the productive use and enjoyment of land. The *Euclid* decision left open the possibility that zoning regulations of the kind generally endorsed might be unreasonable or unjust in their particular application to specific parcels of land. 272 U.S. at 395-96. In *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927), and *Nectow* v. *City of Cambridge,* 277 U.S. 183 (1928), the Court considered such specific challenges and laid down guidelines for their resolution. Both cases involved the same basic kind of land use restraints as those considered in *Euclid,* that is, traditional restrictions on uses deemed to be physically incompatible with each other.

Shortly after the decisions in *Euclid, Zahn,* and *Nectow,* the Court considered a very different sort of zoning provision. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116 (1928), involved a constitutional

challenge to a municipal zoning provision that barred "philanthropic home[s] for children or for old people" from a zoning district unless "the written consent shall have been obtained of the owners of two thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118. The *Roberge* case might have provided the occasion for a rehearsal of the question raised here, concerning the permissible range of interests pursuable by local governments, but it did not;[35] the Court rested its decision invalidating the ordinance upon the overly broad delegation of authority to local owners, who would be "free to withhold consent for selfish reasons or arbitrarily, and may subject the . . . [landowner] to their will or caprice." 278 U.S. at 122.

The Court has thus never validated zoning devices which speak to the kind of persons or households who may live in districts set aside for residential purposes; and its general validation of comprehensive zoning cannot be construed to include such practices.

Legal challenges to racially motivated zoning laws provide an important insight into the Court's response to zoning which is directed at social separation. In *Buchanan* v. *Warley*, 245 U.S. 60 (1917), the Court struck down an ordinance, adopted in Louisville, Kentucky, which imposed residential segregation by race on the basis of a block-by-

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[35] The Court in *Roberge* did, however, note:

> "We find nothing in the record reasonably tending to show that [the home for the aged's] construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person." 278 U.S. at 122.

This language was interpreted by the Eighth Circuit Court of Appeals as implying a limitation on the scope of the police power. *Women's Kansas City St. Andrew Soc.* v. *Kansas City*, 58 F.2d 593, 601 (8th Cir. 1932).

block majority formula. The *Buchanan* case assumes particular significance when set against the then fully accepted view that "separate but equal" facilities for black citizens satisfied the mandate of equal protection of the laws. See *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). Prior to the determination in *Buchanan,* a noted legal scholar, Ernst Freund, had predicted its outsome, attributing the deviation from the principle of *Plessy* v. *Ferguson* to the special place in our constitutional tradition occupied by the right to migrate freely and settle within as well as among the states.[26]

Two state courts also anticipated the decision in *Buchanan* v. *Warley* and struck down ordinances closely resembling the Louisville enactment, despite their articulated fidelity to the view that states and their subdivisions had broad authority to promote and maintain the separation of the races. See *Carey* v. *City of Atlanta,* 143 Ga. 192, 84 S.E. 456 (S. Ct. Ga. 1915); and *State* v. *Darnell,* 166 N.C. 300, 81 S.E. 338 (S. Ct. N.C. 1914). In *Darnell,* the Supreme Court of North Carolina was explicit about its discomfort with the vision of a society in which social preferences as to neighbors were given the force of law:

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[26] "If legitimate purposes do not justify the impairment of the general liberty of migration and settlement, measures for the separation of classes must be still more obnoxious to the constitution. While the United States Supreme Court has sanctioned compulsory separation of white and colored persons in public conveyances, it has intimated that the assignment of separate residence districts on the basis of color, creed or nationality would not be tolerated, and it has been held that Chinese persons cannot be compelled to live in one portion of a city [citing *In re Lee Sing,* 43 Fed. 359 (1890)]. A compulsion of this character will almost invariably be contrary to the equal protection of the laws." Freund, *Police Power* 530 (1904).

"We do not think that the authority conferred by section 44 of the charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the Legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our state. To do so would give to the words 'general welfare' an extended and wholly unrestricted scope which we do not think the Legislature could have contemplated in using those words. If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith." 166 N.C. at 302, 81 S.E. at 339.

Another set of judicial reactions to municipal zoning which indicate great concern about zoning which seeks social rather than physical compatibility involves those few instances in which municipalities enacted ordinances requiring a minimum cost or value for residential structures. These were invalidated in each instance where the issue was litigated. See *Borough of Speers,* 28 Wash. Co. 224 (Pa. Q.S. 1949); *Brookdale Homes, Inc.* v. *Johnson,* 123 N.J.L. 602, 10 A. 2d 477 (1940), *aff'd,* 126 N.J.L. 516,

19 A. 2d 868 (1941); and *Stein* v. *Long Branch*, 2 N.J. Misc. 121 (1924).

In the wake of the broad endorsement of comprehensive local zoning in *Euclid* v. *Ambler, supra*, the Court of Appeals for the Eighth Circuit reviewed an ordinance which would have excluded a home for elderly women in an extant, single family residence from a residential district. *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932). In defense of the ordinance, witnesses for the city urged that the home would be "depressing," because of the presence of "wheeled chairs and invalidism," and would not be "conducive to the happiness of the people who live in the residence district." 58 F.2d at 602. The court invalidated the ordinance, reasoning that:

> "To justify such restriction the police power would have to be extended, not only to restricting certain districts to residence purposes, but to restricting such districts to particular classes of residents, and this has been quite universally condemned by the decisions. In Village of University Heights et al. v. Cleveland Jewish Orphans' Homes (C.C.A.) 20 F. (2d) 743,[37] the Court held against discrimination as to the orphanage. The

[37] In *Village of University Heights* v. *Cleveland Jewish Orphans' Homes*, 20 F.2d 743 (6th Cir. 1927), the Sixth Circuit Court of Appeals concluded as follows:

> "We can see many valid reasons, affecting the public welfare, which would justify the exclusion of factories, business houses, shops and even apartment houses from strictly residential districts, but which would not apply to the use of structurally proper cottages for an orphanage; and while an orphanage would no doubt be less agreeable to the community in some respects than a private school or private residences, we are unwilling to hold that it is within the power of the village to prohibit the use of cottages of this character for that purpose." 20 F.2d at 745.

> only difference between that case and this apparently is the question of age of the occupants. It would be very difficult to satisfactorily distinguish the Jewish Orphanage case from this. When the question arose as to the right to discriminate against colored citizens, the Supreme Court held, as we have before pointed out, that such discriminations to color or race violate constitutional inhibitions. If there is no basis for restriction as to color or race or as to an orphans' asylum, how can a discrimination based on age or poverty be sustained? In Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 1070, 30 L.Ed. 220, it is pointed out that the guarantees of protection contained in the Fourteenth Amendment to the Constitution are universal in their application 'to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,' to which might be added 'or of age or poverty.'" 58 F.2d at 603-604.

In recent years, the lower federal courts have closely scrutinized municipal land use decisions bearing overtones of racial exclusion.[38] While the constitutional prohibition of racial discrimination provides the doctrinal foundation of these decisions, the broader proposition that a municipality "may not restrict the class of Americans to be housed therein" has surfaced as well. See *Crow* v. *Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). Recent state court decisions have echoed this theme:

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[38] See, e.g., *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971); *Dailey* v. *City of Lawton*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Spanish Speaking Orgnaization* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

"It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area." *Appeal of Kit-Mar Builders,* 439 Pa. 466, 474-75, 268 A.2d 765, 768-79 (S. Ct. Pa. 1970).

"What we will not countenance then, under any guise, is community efforts at immunization or exclusion." *Golden* v. *Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (Ct. App. N.Y.), appeal dismissed, 409 U.S. 1003 (1972).

"Exclusionary zoning may lead to illegal and unwanted conditions which are violative of individual rights. No municipality can isolate itself from the difficulties which are prevalent in all segments of society . . . zoning is not a boundless license to structure a municipality." *Molino* v. *Mayor & Council of Borough of Glassboro,* 116 N.J. Super. 195, 204, 281 A.2d 401 (Super. Ct. N.J. 1971).

The lesson of this survey is plain. When zoning ordinances have become the means of achieving the end of social homogeneity, the broad judicial tolerance for municipal planning enactments has been withdrawn; in its place there is a pattern of virtually uniform condemnation and invalidation of such enactments. This has been true even in recent decisions involving seemingly benign local efforts. Thus, ordinances which reserve residential occupancy for elderly citizens have been invalidated. See *Hinman* v. *Planning and Zoning Comm.,* 26 Conn. Supp. 125, 214 A.2d 131 (Ct. Comm. Pl. Conn. 1965); and *Taxpayers Ass'n of Weymouth Township, Inc.* v. *Weymouth Township,* 42 U.S.L.W. 2274 (N.J. App. Div. Oct. 30, 1973). Indeed, the Supreme Court of Virginia recently invalidated an ordinance which required subdividers to provide a specified percentage of

homes within the financial reach of low and moderate income persons, because it found land use regulations could be used "neither to include nor exclude particular socio-economic groups." *Board of Supervisors of Fairfax County* v. *DeGroff Enterprises*, —— Va. ——, ——, 198 S.E.2d 600, 602 (S. Ct. Va. 1973).[39]

Not surprisingly, ordinances restricting occupancy by households of unrelated persons have also fared poorly in the courts.[40] In *Kirsch Holding Co.* v. *Borough of Manasquan*, 59 N.J. 249, 281 A.2d 513 (S.Ct.N.J. 1971), the Supreme Court of New Jersey considered two ordinances which restricted occupancy to "one or more persons related by blood or marriage occupying a dwelling unit and living as a single nonprofit housekeeping unit" or to "a collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit." Even with the addition of this second category of permitted occupancy, the New Jersey Court found the ordinances "sweepingly excessive, and therefore legally unreasonable," 59 N.J. at 251-52, 281 A.2d at 518, and invalidated them. An earlier decision by an intermediate appellate

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[39] There is a significant analytical distinction between ordinances which seek to maintain social homogeneity by excluding non-conforming persons and those which seek to include classes of persons who would not otherwise live in an area. The *DeGroff* decision is proffered here merely as an indicator of general judicial hostility towards the use of land use regulations for the purpose of social engineering.

[40] One federal decision does sustain an ordinance restricting group occupancy. See *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd, per curiam*, No. 71-1656 (9th Cir. Nov. 13, 1973). Significantly for the purpose of this discussion, the Court does not rely on the goal of social homogeneity; but rather, upon interests of the sort considered in Point II of this brief, *infra*.

court in New Jersey was to the same effect. See *Gabe Collins Realty, Inc.* v. *City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. N.J. 1970). The Supreme Court of Illinois held that ordinances which proscribe group occupancy, and which thus "penetrate so deeply . . . into the internal composition of a single housekeeping unit," were beyond the scope of the general welfare provision of the state zoning enabling act. *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 438, 216 N.E. 2d 116, 120 (S.Ct. Ill. 1966).

Our democratic tradition of a mobile, heterogeneous society is reflected in this review of zoning cases. They span six decades and are drawn from the federal judiciary at all levels and from a wide variety of state courts. They are consistent in a view of "ordered liberty" which does not accommodate the use of the coercive power of the state to create exclusive residential enclaves.

E. *Even if, Contrary to the Arguments Above, a State May Undertake to Create Socially Homogeneous Residential Enclaves, No Single Community Like the Village of Belle Terre Can Unilaterally Undertake to Make of Itself Such an Enclave.*

The assertion that it is a legitimate interest of government to divide the state into socially homogeneous enclaves plainly assumes that there will remain readily available attractive, residential opportunities for persons like the Appellees whose households have been excluded from a given community. The District Court relied heavily upon the possibility of the Appellees' finding housing elsewhere than in Belle Terre in validating the Village's ordinance;[41]

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[41] "There is no obstacle to the plaintiff tenants' obtaining legally similar kinds of property in other communities than Belle Terre. There is no present threat that exclusion from Belle

and the Appellants stress the availability of alternate housing in their brief before this court.[42]

It is hard to imagine that a law restricting the occupancy of unrelated persons throughout the state or a region of the state could possibly be defended. But constitutional acceptance of social enclaves on the basis of equal or at least adequate housing opportunities for diverse groups in turn assumes state-wide or region-wide planning mechanisms which are empowered to make such opportunities available and which can be judicially accountable for a failure to have done so. Here, there are no such mechanisms available.[43]

In this case, the Village of Belle Terre, with its small constituency and special community interests, has unilaterally decided to house only traditional families. Without either the means or the will to determine whether adequate housing for unrelated groups exists elsewhere in the region,

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Terre would deny to the plaintiff students the right to live as the group that they are. It may be that, as plaintiffs suggest, other villages, and the Town of Brookhaven, might move in the direction of adopting such a definition of family as Belle Terre has adopted. Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented" (JS 77a).

[42] See Appellants' Brief at 18-25.

[43] The New York Court of Appeals recently concluded:

"Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact (see, e.g., Proposed Land Use and Development Planning Law, §§2-102, 4-101, 4-102; ALI, A Model Land Development Code, art. 7). Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly." *Golden* v. *Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149, appeal dismissed, 409 U.S. 1003 (1972).

whether other communities are physically or socially better disposed to house the persons the Village wishes to exclude, or whether, in broad regional terms, Belle Terre is the appropriate place for an enclave of families, the Village has acted. It has totally excluded unrelated households, which the residents of the Village regard as a burden. The effect of this act is to pass the purported burden onto other communities in the region.[44] The purported availability of housing in these other communities is then raised as a defense to constitutional criticism of the exclusion.

Such a deflection of constitutional responsibility presents an insoluble problem of accountability. If Belle Terre can completely exclude households of unrelated persons, how is the Court to treat the next community in the region which attempts such an exclusion? Or how is the third, fourth or fifth community to be treated?

The question of how this or any other Court should treat enactments of other ordinances like Belle Terre's is by no means hypothetical. In Suffolk County, New York, where the Village is located, the exclusion of unrelated persons

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[44] "If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make." *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 474-75, 268 A.2d 765, 768-69 (S.Ct. Pa. 1970).

"Perhaps in an ideal world, planning and zoning would be done on a regional basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." *Appeal of Girsh*, 437 Pa. 237, 245, 263 A.2d 395, 399, n.4 (S.Ct. Pa. 1970).

from residential zones is becoming a common phenomenon. At least 12 municipalities including Belle Terre have adopted comparable ordinances.[45] In the area around Stony Brook, where the student Appellees attend university, three of the four incorporated Villages have adopted such ordinances.[46]

The Court of Appeals below was sensitive to this problem:

> "If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have. The availability of housing in another community, therefore, does not constitute a defense. Carried to its logical conclusion, such an argument might, after all local communities in an entire area had adopted unjus-

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[45] Village of Babylon, Building Zone Ordinance, Art. I, §100(28);
Village of Belle Terre;
Village of Bellport, Ordinances, ch. 10, Art. II, §206.1;
Village of the Branch, Local Law No. 2, 1970;
Village of Dering Harbor, Local Law No. 2, 1970, Art. I, §1-106g;
Town of East Hampton, Zoning Ordinance, General Regulations §309.5;
Town of Huntington, Zoning Ordinance, Art. II, §1(r);
Village of North Haven, Zoning Ordinance 1965, Art. XIII, §13.1;
Village of Old Field, Unified Code of Ordinances, Art. VII, Ch. 7, Zoning, Part 7.2, Definitions §6;
Village of Port Jefferson, Zoning, Ch. 80, Art. IV, Definitions, §80-8;
Village of Sag Harbor, Building Zone Ordinance, Art. II, §1(d);
Village of Southampton, Zoning Ordinance, Art. I, §Q.
See JS 23a n.9.

[46] Village of Belle Terre, Village of Old Field, and Village of Port Jefferson.

> tifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states" (JS 23a-24a). (Footnote omitted.)

See also, *Demiragh* v. *DeVos,* 476 F.2d 403, 406 (2d Cir. 1973).

Belle Terre's unilateral decision to form of itself a residential enclave for families—or any comparable decision by a single municipality—inherently conflicts with the assumption that adequate residential opportunities for other groups in the society exist. Assuming, *arguendo,* that the creation of social enclaves is a legitimate object of a coordinated state or regional planning effort, an isolated local attempt to effectuate such exclusion must still fail.

II.

The Belle Terre ordinance does not bear a "fair and substantial relationship" to any legitimate interest of government.

Beyond its goal of securing household uniformity, the Village of Belle Terre asserts that its ordinance can be justified by reference to several more traditional objectives. An examination of these professed objectives indicates that the ordinance does not rationally advance them and cannot be sustained on this basis.

Absent a finding that some stricter standard of review is appropriate,[47] legislative classifications challenged under the equal protection clause must be shown to be "rationally related" to a legitimate governmental interest. See, e.g., *United States Department of Agriculture* v. *Moreno, supra,* 93 S.Ct. at 2825. The "rational relationship" test has been formulated in several different ways. One early formulation, recently affirmed by the Court, fairly states its essence: a classification must "rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920); see also *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); and *Eisenstadt* v. *Baird,* 405 U.S. 438, 447 (1972).

Any suggestion that the rational relationship test is tantamount to a reflexive validation of the challenged classification has been fully dispelled by recent decisions of this Court in which the connection between the classification at issue and possible justifying governmental interests has

[47] In Point III of this brief, *infra,* Appellees contend that a posture of strict scrutiny is appropriate in the case at bar.

been examined and found too remote to satisfy the requirements of the test. See, e.g., *United States Department of Agriculture* v. *Moreno, supra; James* v. *Strange,* 407 U.S. 128 (1972); *Jackson* v. *Indiana,* 406 U.S. 715 (1972); *Humphrey* v. *Cady,* 405 U.S. 504 (1972); *Eisenstadt* v. *Baird, supra;* and *Reed* v. *Reed, supra;* see also, *Frontiero* v. *Richardson,* 93 S.Ct. 1764, 1773 (1973) (Powell, J., concurring).[48]

From these recent cases, two rudimentary principles concerning the rational relationship test emerge. First, the test is concerned with actual legislative purposes, not hypothesized, *post facto* explanations which could not rationally have been the intended object of the challenged enactment. See *Eisenstadt* v. *Baird, supra,* and *United States Department of Agriculture* v. *Moreno, supra.* Second, the claim for a "fair and substantial relationship" between the challenged enactment and a legitimate interest of government must be bottomed on some plausible view of empirical reality; wholly unsubstantiated speculation is not sufficient. See, e.g., *Reed* v. *Reed, supra; United States Department of Agriculture* v. *Moreno, supra.*

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[48] These cases, it has been suggested, represent some departure from an earlier tradition of the rational relationship test. In one view, they signal a general vitalization of the test, giving it the substance of its words. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). In another, they posit an activated form of the test which is selectively applicable where the personal interests at stake are more substantial than in traditional economic regulation cases. See the opinion of the Court of Appeals below at 14a-18a; see also, *Demiragh* v. *DeVos,* 476 F. 2d 403, 405 (2d Cir. 1973). Whether perceived as a product of a continuation of the traditional test, a generally vitalized test, or a selectively appropriate test, the analysis reflected in these cases is fully applicable to the case at bar, which implicates fundamental personal rights. See Point I of this brief, *supra,* and Point III, *infra.*

These principles assume special prominence in a situation where the challenged classification by its nature strongly suggests that its primary purpose is either of questionable legitimacy (e.g., the desire to prevent the use of contraceptives in *Eisenstadt, supra*) or plainly invalid (e.g., the desire to harm "hippies" in *Moreno,* or the goal of social homogeneity in the instant case). Thus, in *Eisenstadt,* the proffered justifications of the deterrence of fornication and the protection of health were ultimately rejected as utterly implausible explanations of the challenged statute's purpose. 405 U.S. at 448-453. In *Moreno,* the Court acknowledged "considerable doubt" as to the genuineness of the claim that welfare fraud deterrence prompted the statute, 93 S.Ct. at 2826-27, but went on to find the interest insufficiently connected to the challenged provision. *Id.* at 2827. Professed legislative objectives which conveniently "sanitize" a constitutionally questionable or invalid goal should be considered closely.

In the case at bar, Appellants put forward as justification of the contested ordinance, in addition to its primary purpose of securing social homogeneity, the following interests: (1) controlling residential density; (2) preventing rental escalation; and (3) minimizing transiency. The District Court considered and rejected these justifications as insufficiently connected to the challenged ordinance:

> "[I]t is not considered that the case may be rested on population density, traffic problems, over-loaded parking facilities, and the effect on rentals generally" (JS 79a).
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> • • • • •
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> "Such a restricted zoning district might well be all but impossible to justify . . . by its service of such familiar zoning objectives as safety, adequate light and air,

preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water sewage, school, park and other public services" [49] (JS 74a).

The Court of Appeals found the objectives advanced by the Village to be purely hypothetical and unacceptably speculative:

"If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support. To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed" (JS 20a-21a).

An examination of the interests relied upon by the Appellants supports the conclusions reached by both Courts below.

Density

The Village claims that the ordinance serves the purpose of regulating the density of population. One initial inquiry, however, is whether the Village has any genuine concern about the density of its population at all; an examination of the record strongly suggests that it does not. The Village

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[49] The same conclusion was reached by the Supreme Court of Illinois in the course of reviewing an ordinance similar to that contested here. See *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 434, 216 N.E.2d 116, 119 (S.Ct. Ill. 1966).

of Belle Terre occupies approximately one square mile, or 640 acres.[50] Over this area are spread 220 single family houses. As the Village is essentially fully developed,[51] this pattern of land use is fixed.[52] The present population is approximately 700, yielding a density of slightly less than 1.1 person per acre. It strains credulity to suppose that in 1971, when the contested ordinance was first enacted, there was any concern at all that the Village, fully developed, would suddenly suffer a surfeit of population, and that this concern was addressed by excluding groups of three or more unrelated persons, while admitting families of all sizes, and any number of servants.[53] The Village, it must be noted, does not assert that it has any such concern, or that density was in fact a consideration in enacting the ordinance.[54] Nor is there any suggestion

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[50] Affidavit of Harriet Coorssen, A48.

[51] This fact does not appear in the record. It is, however, a matter of common local knowledge, readily observable, and not contested by Appellants.

[52] On what little developable land may remain in the Village, houses must be built on a minimum of one acre, can occupy no more than 20% of the lot and cannot exceed 35 feet in height. Building Zone Ordinance of the Village of Belle Terre, Article III, Sections A-1.1a, A-1.2a, and A-1.5b.

[53] Article I Section D-1.35a of the Building Zone Ordinance defines family, in part, as:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.

[54] There is an added element of improbability inherent in the selection of two unrelated persons as the maximum. Surely if density was the concern a much higher number would have been fixed upon. The Appellants' own explanation for the maximum number indicates that its selection had absolutely nothing to do with density. See Appellants' Brief at 30.

by the Village that any population studies, projections or analyses of any kind were undertaken in this connection. Rather, the position of the Village seems to be that it can *post facto* hypothesize a governmental interest advanced by its ordinance in the abstract, ignoring its actual purpose and ignoring the actual needs of the Village.

Even considered in the abstract, the relationship between the ordinance and the density of population is at best an extremely attenuated one. The essence of the Village's claim is that households comprised of persons related by blood, adoption or marriage tend to be "self-limiting" in size, while households of unrelated persons are not. It is within common experience that traditional family units comprised of husband, wife and children vary in size over a broad range; the additional possibility that "brothers, uncles, grandparents or other relatives" (Appellants' Brief at 32) can live together or with a family unit broadens the range of size still further. The addition of "household servants," who are expressly excepted from the ordinance,[55] makes still more elastic the potential size of families. Conversely, the number of unrelated persons who can and will live and cook "together as a single housekeeping unit," [56] is by no means limitless, either as a matter of law or practicality. To theorize that permitting unrelated households to live in the community would significantly affect density is, as the Court of Appeals below concluded, "rank speculation" (JS 21a). Indeed, it is speculation which conflicts with the available census data. Those data indicate that the percentage of families with seven or more persons is significantly higher

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[55] See note 53 *supra*.

[56] *Id.*

than the percentage of households in general—including families and groups of unrelated persons—with seven or more persons;[57] further, they indicate that the average size of traditional families is somewhat larger than the average size of all households.[58]

If there is an abstract relationship between an ordinance like that contested here and population density, it is slight and unpredictable as to its direction. When set against the realities of the Village of Belle Terre, the relationship is diminished still further. Belle Terre is fully developed with single family homes. Only the most insufferable kind of overcrowding could possibly bring a large group into Belle Terre, overcrowding which could and should be made the object of specific legislative prohibition.

As a claim derived from the density of population assertion, the Village suggests that the ordinance may reduce parking and traffic problems (Appellants' Brief at 32-33). There is no indication that the Village does have or reasonably could anticipate having any genuine concerns in this regard. Parking is presently prohibited on all highways within the Village,[59] and the 700 residents are provided with four municipal parking areas.[60] As to traffic, the Village is comprised of 220 single family homes. It has no industrial, commercial or institutional facilities of any kind to surcharge the roads. Present traffic control is effectuated

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[57] Bureau of the Census, *The American Almanac* 41, Tables 53 and 54 (1973).

[58] *Id.* at 50, Table 50.

[59] Code of the Incorporated Village of Belle Terre, Article VIII, Section 31.

[60] *Id.*, Section 39.

by stop signs or yield signs at 30 intersections within the Village,[61] a circumstance which strongly reinforces the supposition that traffic is light.

Parking and traffic problems are a remote possibility apparently never considered by the Village in connection with the contested ordinance until the advent of the instant litigation. Further, there is no showing of a substantial impact on either parking or traffic with the advent of households of unrelated persons. Families not uncommonly have two adult drivers; and teenage children and household servants can certainly be expected to drive and often own cars in a suburban community. Again, the claim of the Village is utterly speculative, and entirely implausible.

Rents

The Village's contention in this regard is that household groups of unrelated persons can price single families out of the rental market, and that the ordinance prevents this from taking place.

There is no suggestion that the Village was in fact concerned about its rental situation. Nor is there any showing that in the suburban community of Belle Terre there is any significant proportion of the houses even available for rent. Presumably, most homes are owned and occupied by families; and it is virtually inconceivable that any substantial number of the owner-occupied homes are going to be turned over to rentals. Moreover, there is nothing in the record to support the contention that in a middle class, suburban residential community like Belle Terre, traditional families are willing to pay more or less rent than students

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[61] *Id.*, Article VII.

with limited means like the Appellees.[62] And there is no suggestion whatsoever that Belle Terre undertook to determine whether there is any shortage of rental opportunities for single families within the Village or within the area around the Village; or any suggestion that the Village was operating on the basis of a perceived state of affairs in this regard. The rent control interest on which the Village attempts to rely is at once hypothetical in its design, speculative in its need, and utterly remote in its effectuation.

But, even if we accept *arguendo* the claim that some number of traditional families might be priced out of the Belle Terre rental housing market, no justification for the zoning exclusion can be derived. Decent, attractive and reasonable residential opportunities are as important to the members of household groups like the student Appellees as to the members of traditional families. Surely the Village cannot rationally sacrifice the interest of one class of citizens in order to render somewhat more secure the interests of another class, without any effort to measure the actual needs of either.[63]

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[62] The sole information in Appellants' affidavits consists of the rental figures for two houses, which are described only by location and number of bedrooms. See A48. No information is given as to the size of the lots on which the houses sit, or their market value. The utter non-utility of such limited information is reflected in the affidavit itself. A four-bedroom house is said to rent for $350.00; this is a figure entirely in line with the $500.00 rent of the six-bedroom Dickman House. On the other hand, another six-bedroom house is said to rent for $350.00. The only safe conclusion is that no conclusion can be drawn from such sparse data.

[63] A rational decision to totally sacrifice the housing interests of one group to meet the needs of another would depend at a minimum on a full consideration of the regional housing needs and opportunities of the group to be so benefited. It is quite possible that such a decision is simply inappropriate for a small municipality to make. Compare pp. 42 to 46, *supra*.

Without any effort to measure the actual housing needs of either traditional families or unrelated persons such as the student Appellees herein, the justification of the Belle Terre ordinance on the basis of the need to prevent rental escalation amounts to little more than an arbitrary preference for traditional families and an irrational exclusion of unrelated persons. To this extent, the argument returns to the proposition upon which it commenced: that the social preference of the residents of Belle Terre for neighboring households comprised of families is not a legitimate interest of government and cannot be proffered as justification for the challenged ordinance.

Transiency

The Village asserts that its ordinance can be justified as an attempt to minimize transiency.[64] Appellants' Brief at 36-40. This professed interest in preventing a turnover of local population conflicts drastically with the right to travel. That right plainly includes the right to migrate to and settle within a community. See *Shapiro* v. *Thompson, supra; Dunn* v. *Blumstein, supra.*[65] Necessarily this freedom implies the right to leave a place as well.[66] To select

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[64] The Village also speaks of "community stability," but what it apparently seeks to express is the hope that people will remain in the Village. Accordingly, "community stability" means little more than "geographic stability" and the Appellants' stability claim is thus merely a restatement of the transiency argument.

[65] There is a more complete discussion of the right to travel in Point I, *supra,* pp. 16 to 21.

[66] At the time of our colonization, the English Crown by means of the writ *ne exeat regno* had the acknowledged authority to prevent the departure of any person from the kingdom, and one royal proclamation ordered English squires to remain at their manors in the country until the end of summer and attend to their responsibilities. In contrast, the Body of Liberties of the Massachusetts Bay Colony specified the "free libertie" of every man to remove

out and exclude persons because they are perceived as more likely to leave in a relatively short time is to deny persons the right to travel because of a prediction that they will soon exercise that right again. It is difficult to imagine an objective more antithetical to the freedom of migration upon which the right to travel is based.

But even accepting, *arguendo*, the legitimacy of the interest in excluding persons who are likely to remain for a relatively short period of time, the premise that the ordinance serves this interest is wholly unfounded. As the Court of Appeals held, the record reveals no "vestige of . . . support" for such speculation (JS 20a).

The proposition that persons related by blood, adoption or marriage are likely to remain in a community for a longer period of time than a household of persons who do not enjoy such characteristics is utterly unsupportable. It totally ignores the reality of contemporary American migratory patterns. We are an extraordinarily mobile people, carried by professional, educational and social needs from one part of the country to another. According to the 1970 census figures more than one-half of the people in the United States moved to their present homes within the prior five years; and between one-quarter and one-fifth of our population changed their residences within the single year preceding the census.[67] The wishful hypothesis that

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himself and his family from the Colony at will. See Haskins, *Law and Authority in Early Massachusetts* 202 (1960) and Freund, *Police Power* 529, n.24 & text (1904).

[67] Fifty-four percent of the population moved in the five years preceding the 1970 census; 23% within the year preceding the census. U.S. Bur. of Census, Population: Gen. Soc. & Econ. Characteristics, Final Report. PC (1)—C1. U.S. Summary 404 (Table 98) (1970).

Belle Terre is a "tiny Village" which by virtue of this circumstance can escape the migratory forces which prevail elsewhere[68] is likewise flatly contradicted by the available census data. Those data indicate that there is no significant difference in mobility rates as among the nation generally, urban centers of population, and suburban communities, like Belle Terre, situated on the urban fringe.[69]

In sum, the goal of selecting out relatively short-term residents is constitutionally impermissible. Were it proper to attempt such an exclusion, the Belle Terre ordinance would be a completely irrational means of so doing.

In Lewis Carroll's *Through the Looking Glass,* Alice encountered the White Knight, whose slogan was "it's my own invention," and who characteristically generated grossly implausible, ineffective solutions to simple or nonexistent problems. The Village's assertion that the exclusion of nonfamilial households serves the interests of regulating density, controlling rents and reducing transiency comes perilously close to the chronic illogic of the White Knight.[70]

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[68] Appellants' Brief at 36.

[69] Fifty-three percent of the persons living in the urban fringe moved within the five year period preceding the 1970 census, as opposed to 54% nationwide. Twenty-one percent of the people living in the urban fringe moved within the one year period preceding the 1970 census, as opposed to 23% nationwide. *Ibid.*, note 67, *supra.*

[70] "I was wondering what the mouse-trap was for," said Alice. "It isn't very likely there would be any mice on the horse's back."

"Not very likely, perhaps," said the Knight; but, if they *do* come, I don't choose to have them running all about.

"You see," he went on after a pause, "it's as well to be provided for *everything.* That's the reason the horse has all those anklets round his feet."

(*footnote continued on next page*)

If this characterization is unfair to the Village's officials, it is because they do not in reality appear to have intended to effectuate these interests by means of the contested ordinance. Nor, indeed, does the Village appear to have any actual concern with these interests at all.

What Belle Terre has asked this Court to do is to speculate that some village might pass an ordinance like that contested here, that such a village might have legitimate cause for concern in one of these areas, and that such an ordinance at some time or place might have an affirmative bearing on one or more of these concerns. The Village of Belle Terre's own interest in density, rents or transiency is purely hypothetical. Its empirical assertions are wholly unsubstantiated, and often starkly contradicted by readily available data. And its tender of these traditional interests is precisely the kind of claim rejected in *Eisenstadt* v. *Baird, supra,* and *United States Department of Agriculture* v. *Moreno, supra.*

"But what are they for?" Alice asked in a tone of great curiosity.

"To guard against the bites of sharks," the Knight replied. "It's an invention of my own."

Carroll, Through the Looking Glass, in Gardner, ed., The Annotated Alice 298 (Forum pbk. 1960).

III.

The Belle Terre ordinance impinges upon the exercise of fundamental constitutional rights and is appropriately subject to more rigorous review than that mandated by the rational relationship test.

If this Court finds that, (1) the social preference of the Belle Terre residents for family households is not a legitimate interest of government and, (2) that the contested ordinance bears no rational relationship to any legitimate interest of government, then the ordinance is plainly invalid, as found by the Court of Appeals below. If, however, either of these propositions is rejected by the Court, then a third question must be faced, namely, whether the ordinance is properly subject to a stricter scrutiny than that of the rational relationship test, and if so, whether any of the interests proffered in justification of the ordinance survive the scrutiny which is their due. It is Appellees' position that the ordinance should properly be measured against the compelling state interest test, or alternatively, against an intermediate test reflecting a heightened judicial scrutiny; and further, that none of the interests advanced in support of the Belle Terre ordinance can possibly survive either test.

A. *The Belle Terre Ordinance Impinges Upon the Right to Travel and the Right of Privacy; the Compelling State Interest Test Is the Standard by Which It Should Be Judged.*

Where a legislative enactment is found to impinge upon the exercise of a fundamental right, it must be shown "to be necessary to promote a compelling state interest," or it will be held unconstitutional. *Dunn* v. *Blumstein,* 405 U.S.

330, 338-39 (1972). It is firmly established that the right of privacy and the right to travel are fundamental rights, and that impingement upon their exercise triggers the invocation of the compelling state interest test. See *Dunn* v. *Blumstein, supra,* 405 U.S. at 338-39; *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Roe* v. *Wade,* 410 U.S. at 155; and *Eisenstadt* v. *Baird,* 405 U.S. 438, 447, n.7 (1972).

In Point I of this brief, Appellees have argued at some length that the exclusion of persons from a community because they or their households are socially offensive to the residents of that community is antithetical to the precepts of the right to travel.[71] Further, Appellees have argued that the specific criterion of exclusion employed in the Belle Terre ordinance, turning as it does on the deeply personal choices of individuals pertaining to the formation of their households, does violence to the right of privacy.[72]

But the argument in Point I of this brief is directed to the proposition that the pursuit of social compatibility through the Belle Terre ordinance is an improper interest of government. Here, Appellees assert a different claim, namely that the ordinance, whether founded on legitimate interests of government or not, impinges on the fundamental rights of travel and privacy, and can only be justified if necessary to the achievement of a compelling state interest. The essence of the claim in Point I is that acts by government which are motivated by a desire to effectuate social homogeneity inherently threaten fundamental constitutional rights, and that such a desire is for that reason

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[71] See pp. 16 to 21, *supra.*

[72] See pp. 21 to 27, *supra.*

not a legitimate governmental interest. The argument here is that a given enactment, the Belle Terre ordinance, actually does impinge upon the exercise of such rights, whatever its motivation.[73]

Much of the discussion in Point I informs this argument. The claim that the right to travel includes the freedom of intrastate migration and settlement and prohibits the erection of community residential barriers is the predicate of the argument here that the Belle Terre ordinance impinges upon the right to travel. In like fashion, the claim in Point I that decisions concerning the choice of one's household associates are entitled to the protections of the right of privacy is the basis of the argument here that the Belle Terre ordinance impinges upon the right of privacy. The argument here, however, is that the actual impact of the contested ordinance on persons who—like the student Appellees—desire to form households with unrelated persons within the Village of Belle Terre is of the kind that constitutes an impingement upon the rights of travel and privacy; and that the ordinance should, therefore, be subject to rigorous judicial scrutiny. In considering this question, we will treat separately the right to travel and the right of privacy claims.

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[73] In *Dunn* v. *Blumstein*, *supra*, the State of Tennessee argued that the right of travel in *Shapiro* v. *Thompson* depended upon a showing that the state had actually intended to deter migration; this contention was rejected. 405 U.S. at 339-41.

This is not to say, however, that any law which is detrimental to a person who has migrated to a jurisdiction impinges upon the right to travel. Legal standards which are applicable to all persons in a jurisdiction—like a high minimum age for a driver's license—do not trigger the elevated test. See 405 U.S. at 342, n.12 & text. But a uniform law which excludes persons from settlement in a community surely must. See note 74, *infra*, and accompanying text.

1. *The Right to Travel.*

The question of impingement on the right to travel in the instant case is a complex one. The Appellants suggest that the claim of impingement is utterly frivolous, since "all legal prohibitions [could] be said to indirectly infringe on the right to travel of those living elsewhere who would like to come to a municipality to engage in [an] illegal activity" (Appellant's Brief at 40). But a close consideration of the operation of the Belle Terre ordinance will indicate that it directly bars migration and settlement, and that it is not merely a uniform legal standard which happens to be to the detriment of the Appellees.[74]

Consider a hypothetical ordinance which barred persons over the age of 65 from assuming residence within a community. Such a prohibition on residency directly and drastically conflicts with the right to travel. It does more than penalize the person who migrates and settles; it actually proscribes settlement of a class of persons. Such an ordinance could not possibly consist with the right to travel.

Like this hypothetical provision, the Belle Terre ordinance is a direct prohibition on settlement. The distinction lies in the fact that the hypothetical law bars a certain kind of *person*, and the Belle Terre ordinance bars a kind of *household*. It is a distinction of some substance, since the character of one's household is mutable, unlike the characteristic of age. In a sense, therefore, the barrier to residency posed by the Belle Terre ordinance can be surmounted by a voluntary reformation of an unrelated household. A person who wishes to live in Belle Terre can do so

[74] See note 73, *supra*.

singly, with one other unrelated person, or with any number of persons related by blood, adoption or marriage.

But this ignores the claim of the Appellees that the right of privacy protects the personal decision concerning with whom one is to live. If the right of privacy does protect this decision, then Appellees and others like them are faced with a constitutional Hobson's choice: they may exercise their right to migrate to Belle Terre and there settle and abide, but only at the expense of their right of privacy in forming their household; conversely, they may form their household elsewhere, but only at the cost in constitutional coin of forfeiting their right to assume residence in Belle Terre. A law which forces a choice between fundamental rights impinges upon both. See *Dunn* v. *Blumstein, supra,* 405 U.S. at 342.

This raises the question of whether the right of privacy is impinged if unrelated households of more than two persons are excluded from the Village of Belle Terre.

2. *The Right of Privacy.*

The District Court below found that the rights of the student Appellees were not impinged by the Belle Terre ordinance because the students could live elsewhere in a common household,[75] and the Appellants stress this same argument.[76] A number of considerations combine to make it quite plain that Belle Terre's ordinance does indeed impinge on the Appellees' rights, notwithstanding the fact that Belle Terre is only one community among many, and a rather small one at that.

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[75] See note 41, *supra.*

[76] See note 42, *supra.*

The proposition that Belle Terre's ordinance is valid on the theory that it visits only a relatively small injury on the student Appellees because they may live in unrelated groups in other communities is tantamount to a doctrine of "separate but equal." It is a proposition wholly without supportive analogy in contemporary constitutional law. It is clear that a community could not defend against a charge of racial exclusion on the basis that blacks could obtain ample housing in other communities. *Buchanan* v. *Warley, supra.* It is equally clear that an abridgement of free expression could not be justified on the basis of its geographical confinement. In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), where an ordinance requiring a license for door-to-door canvassing by Jehovah's Witnesses was defended on such a basis, the Court responded:

> "The ordinance . . . sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city-wide in scope *(Jones* v. *Opelika)* are different only in degree. Each is an abridgement of freedom of press and a restraint on the free exercise of religion. They stand or fall together." 319 U.S. at 117.

The Appellants suggest that a community can violate the right of privacy upon the rationale that such a right is not similarly abridged in other communities. But nothing about the right of privacy as applied to the composition of households makes it susceptible to this kind of limitation, which would be summarily rejected in other constitutional contexts.

Moreover, as demonstrated above, if Belle Terre can completely exclude households of unrelated persons and excuse the constitutional implications of its prohibition on the

basis that such groups can go elsewhere, then so too can each and every other community in the region. A unilateral exclusion by the Village of Belle Terre or any other single community can only be evaluated as though its exclusion were universally adopted.[77] See pp. 42 to 46, above.

Furthermore, the acceptance of the view that a zoning ordinance which would be a clear infringement of the right of privacy if adopted on a broad scale is valid if adopted by a single community leads to the same Hobson's choice considered above in the context of the right to travel. There is a kind of *legerdemain* involved in the Appellants' position: the right to travel argument is met by the suggestion that persons wishing to live in Belle Terre reform their households, and the right to privacy contention is countered

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[77] The Court in *Palo Alto Tenants Union* v. *Morgan, supra,* appears to be sensitive to this problem; its decision seems to require some legal provision for households of unrelated groups in each community:

> "The right to form [communal living groups] may be constitutionally protected, but the right to insist that these groups live under the same roof, *in any part of the city they choose,* is not." (Emphasis added.)

> "The Court must stress what this case is *not* . . . . [t]here [is no] showing that the ordinances challenged operate to totally exclude the indigent or the politically voiceless from the City of Palo Alto. See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969); see also Southern Alameda Spanish Speaking Organization v. Union City, 9 Cir. 424 F.2d 291 (1970). The ordinances here challenged affect only two of the many zones into which the City has been divided. Unrelated groups of more than four persons may live together in other zones, including those designated for lodging houses, duplexes, triplexes, and so on." 321 F. Supp. at 912.

This position does not meet the other objections to the view that some housing for groups eliminates any constitutional problems. It does however, make the problem of accountability for providing areas where unrelated groups may live much less acute.

by advice to live somewhere else. After two passes, the substantial personal freedoms at stake have vanished.

The foregoing analysis indicates that the rights of travel and privacy, as more fully amplified in Point I of this brief, are sufficiently implicated and impinged by the Belle Terre zoning ordinance to warrant invocation of the compelling state interest test. Viewed through the lens of this stringent test, the Belle Terre ordinance is glaringly unconstitutional. None of the proffered justifications, even if deemed legitimate, could possibly be considered compelling. Moreover, even if the justifications asserted by the Appellants were found to be compelling governmental interests, the ordinance is not necessary to the promotion of those interests, as will be demonstrated *infra*.[78]

B. ***Alternatively, an Intermediate Standard of Review Incorporating the "Less Drastic Means" Principle Is Appropriate.***

Recent decisions of this Court indicate that the two common alternative standards of scrutiny—the rational relationship and compelling state interest tests—are not the only possible postures of review. In several decisions, the Court has articulated intermediate tests which direct a heightened level of judicial scrutiny but fall short of requiring a compelling state interest. In *Bullock* v. *Carter*, 405 U.S. 134 (1972), the Court struck down the Texas regime of candidate filing fees. The Court in *Bullock* held that the fee scheme should be " 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at 144.

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[78] See pp. 71 to 73, *infra*.

Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), also articulated what appears to be a more flexible approach than the stark dichotomy presented by the choice between the rational relationship test and the compelling state interest test:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud, 354 U.S. 457, 1 L.Ed. 1485, 77 S.Ct. 1344 (1957); Williamson v. Lee Optical Co., 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955); Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150, 41 L.Ed. 666, 17 S.Ct. 255 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180 (1954); Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L.Ed. 169, 86 S.Ct. 1079 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" 406 U.S. at 172-73.

Another formulation of what appears to be a more flexible intermediate standard of heightened scrutiny emerged in *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972): "As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

While the precise expression employed in each of these decisions is different, there would seem to be a substantial

confluence of analysis, a common ground which becomes clearer upon a closer examination of the cases themselves. In each of these cases, the Court identified legitimate interests which were, to some degree at least, advanced by the classification in question. In each, some adverse impact upon a fundamental personal interest, or some implication of a suspect criterion of classification, or both, were involved. And in each case, while the Court stopped short of concluding that the compelling state interest test was the appropriate standard, the challenged enactment was invalidated.

The cases appear to have in common a modified form of the "less drastic means" principle which is a part of the compelling state interest test:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' NAACP v. Button, 371 U.S. 415, 438 (1963), United States v. Robel, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn* v. *Blumstein, supra* at 343.

This principle is explicitly echoed in the *Bullock* v. *Carter* formula: "reasonably necessary to the accomplishment of legitimate state objectives." 405 U.S. at 144. See also, *Vlandis* v. *Kline*, 93 S.Ct. 2230, 2239-40 (1973) (White,

J., concurring).[79] It appears to underlie the decisions in *Weber* v. *Aetna Casualty & Surety Co., supra,* and *Police Department* v. *Mosley, supra,* as well.

It is clear that the instant abridgement of the rights of travel and privacy mandates elevated scrutiny of the Belle Terre ordinance. Such strict scrutiny may entail the invocation of the compelling state interest test. Alternatively, it may encompass a flexible approach in examining the challenged legislation, of the kind undertaken by this Court in *Weber* and *Bullock.* As noted above, the common thread running through any elevated approach to the Equal Protection Clause is the elemental formula described somewhat crudely as a "less drastic means" requirement. In operation, such a requirement obliges Belle Terre to advance its interests in a manner which will not unnecessarily restrict constitutionally protected activity.

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[79] "Sometimes we just say the claim is 'invidious' and let the matter rest there, as Mr. Justice Stewart did, for example, in concurring in Frontiero. But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State, as, for example, when a State imposes a discrimination that burdens or penalizes the exercise of a constitutional right. See, e.g. Shapiro v. Thompson, 394 U S 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). I am uncomfortable with the dichotomy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations." 93 S.Ct. at 2239-40.

C. *Measured Against the Requirements of the "Less Drastic Means" Principle, the Constitutional Invalidity of the Justifications Advanced by the Village in Support of the Ordinance Becomes Apparent.*

As demonstrated in Point IIIA, above, the Belle Terre ordinance impinges upon the fundamental constitutional rights of travel and privacy. Accordingly, it is appropriately subject to the requirement that it prove necessary to the promotion of a compelling state interest. And with the element of *necessity* comes the principle that it must be the constitutionally least drastic means of achieving the interest it purports to serve.

Even if this claim were to fail, the alternate, intermediate mode of review pursued in *Bullock* v. *Carter, supra, Weber* v. *Aetna Casualty & Surety Co., supra,* and *Police Department* v. *Mosley, supra,* is plainly applicable to the case at bar. The exclusion of persons from Belle Terre who wish to form households with persons to whom they are not related, substantially and adversely implicates their personal interests in free migration and settlement and in privacy. Even without resolving the question of whether the impact of the ordinance rises to the level of an impingement upon fundamental constitutional rights, this intermediate approach can and should be adopted.

The approach followed in *Bullock, Weber* and *Mosley* incorporates, to a significant extent, the principle of the less drastic means. Hence, whether the compelling state interest test or this alternate mode of review is adopted, the less drastic means inquiry is mandated.

When considered in terms of the less drastic means requirement, Belle Terre's assertions that the contested

ordinance regulates density, controls rents and reduces transiency are manifestly unpersuasive. Far from being reasonably necessary to the achievement of these ends, the ordinance is an extraordinarily oblique, inefficient and constitutionally odious means of pursuing these goals.

An indicated in Point II, the claim concerning population density ultimately reduces to the proposition that the ordinance lessens the likelihood of a very large household assuming residence in the Village. This concern, if it is genuine, could effectively, equitably and unobjectionably be addressed by an ordinance which placed reasonable restrictions upon the ratio of persons to bedrooms, or by some other direct restriction upon overcrowding.

The Village has also portrayed the density interest as encompassing the aim of reducing potential parking and traffic problems. Obviously, parking and traffic regulations constitute a far more direct method of addressing this concern, and one which does not have the side effect of excluding particular groups of people from the Village.

Likewise, the purported concern of the Village to limit escalating rents could be satisfied in a fashion which is at once greatly more effective and less intrusive upon the rights of Appellees and others like them. The enactment of rent controls would fully serve what the Village says its interest is, without trespassing upon the rights of travel and privacy.[80]

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[80] Appellants question whether the Village is empowered to adopt rent controls (Appellants' Brief at 35). If in fact the State has declined to delegate or has superseded the power of municipalities in this area, such an action suggests that the New York Legislature views problems of rental economics as matters of regional or statewide impact. See note 63, *supra*. This policy, as well as Appellants'

It is true that there may be no constitutionally less drastic means of advancing the Village's professed concern to exclude persons who are likely to leave in a relatively short time. The reason that no such alternative exists is twofold: first, as a practical matter, we live in a highly mobile society, and the forces which impel this circumstance are so diverse as to defeat any attempt to secure a community against the tide of mobility—even in a "tiny Village" like Belle Terre. And second, the exclusion of any class of persons on the ground that they may soon wish to leave the community is wholly inconsistent with the right to travel, so that the Village's alternatives in pursuit of this goal are all unconstitutional.

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contention that Belle Terre does not have "the kind of bureaucratic superstructure" necessary to administer a system of rent controls, suggests that it is utterly inappropriate for a tiny community to attempt to address problems of rental economics, including the problem of rental escalation the Village claims as its legitimate interest.

Moreover, Belle Terre's claim that it would be administratively inconvenient to undertake a program of rent control could not provide an excuse for failure to adopt a less drastic means. See *Reed* v. *Reed, supra,* 404 U.S. at 76; *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed, and the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residency by more than two persons not related by blood, adoption, or marriage, adjudged unconstitutional.

Respectfully submitted,

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* Attorneys for Appellees gratefully acknowledge the assistance provided in the preparation of this brief by Ms. Susan N. Herman, third year student at New York University School of Law, and Ms. Judith G. Friedlaender, first year student at New York University School of Law.

In the

Supreme Court of the United States

October Term, 1973

No. 73-191

FILED
FEB 15 197

The Village of Belle Terre, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Dobbs, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolz, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

Bruce Boraas, Anne Parish, Michael Thuman, Edwin Dickman and Judith Dickman,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' SUPPLEMENTAL BRIEF

Pursuant to Rule 41(5) of the Supreme Court Rules, Appellees submit this supplemental brief in order to present certain matters and authorities which were unavailable at the time Appellees' brief was submitted. Specifically, Appellees wish to call the Court's attention to: (a) A changed factual circumstance pending the appeal of this matter; (b) The relationship between the Court's recent decision in *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 U.S.L.W. 4186 (Nos. 72-777 & 72-1129, January 21, 1974) and Appellees' contentions; and (c) A recent

decision of the United States District Court for the Eastern District of Wisconsin, which invalidates an ordinance quite similar to that contested in the instant case. A copy of this decision, *Timberlake* v. *Kenkel,* —— F. Supp. —— (E.D. Wisc., Civil Action No. 72-C-664, Jan. 8, 1974), is appended hereto as Appendix I.

A. *Changed Circumstance.* Since the time of the submission of Appellees' brief, the Appellees Judith and Edwin Dickman have relet the premises in question in this action. Their new tenants are six adults who are not related by blood, adoption or marriage. Counsel for Appellees are informed that the new tenants have formed a common household in a manner essentially like that of Appellees Boraas, Truman, Parish and their associates and that the leasehold relationship is a periodic, month-to-month tenancy.

B. *Cleveland Board of Education* v. *La Fleur.* In *La Fleur, supra,* this Court invalidated mandatory maternity leave in two school districts. The context and analysis of this decision supports the legal contentions advanced by the Appellees in several respects.

First, the *La Fleur* decision is consistent with the Appellees' contention that when a constitutionally suspect or invalid purpose appears to underly a governmental enactment, the Court will examine more closely other interests which are proffered to justify the enactment. See 42 U.S. L.W. 4186, 4189, n. 9, and 4192-93; and see Brief for Appellees at 48-49. Second, while the analytical predicates of Mr. Justice Stewart's opinion for the Court and of Mr. Justice Powell's concurring opinion in *La Fleur* are different, they converge in the unsatisfied judicial demand for a rational relationship between governmental means

and ends.* See 42 U.S.L.W. at 4190, and 4193-94. This circumstance supports Appellees' contention that the demand for a rational relationship, where appropriate, is a genuine requirement which cannot be satisfied by wholly unsupported assertions that a legitimate end of government is served by the challenged enactment. See Brief for Appellees at 47-50.

C. *Timberlake* v. *Kenkel.* In the *Timberlake* case *supra,* the District Court, relying substantially upon this Court's decision in *U. S. Dept. of Agriculture* v. *Moreno,* 93 S. Ct. 2821 (1973) and upon the Second Circuit decision in the case at bar, found a zoning ordinance which was similar to that enacted by Appellants here, to be unsupported by any rational basis which might be consistent with permissible zoning objectives. A copy of the *Timberlake* decision —which is as yet unreported—is appended hereto.

Respectfully submitted,

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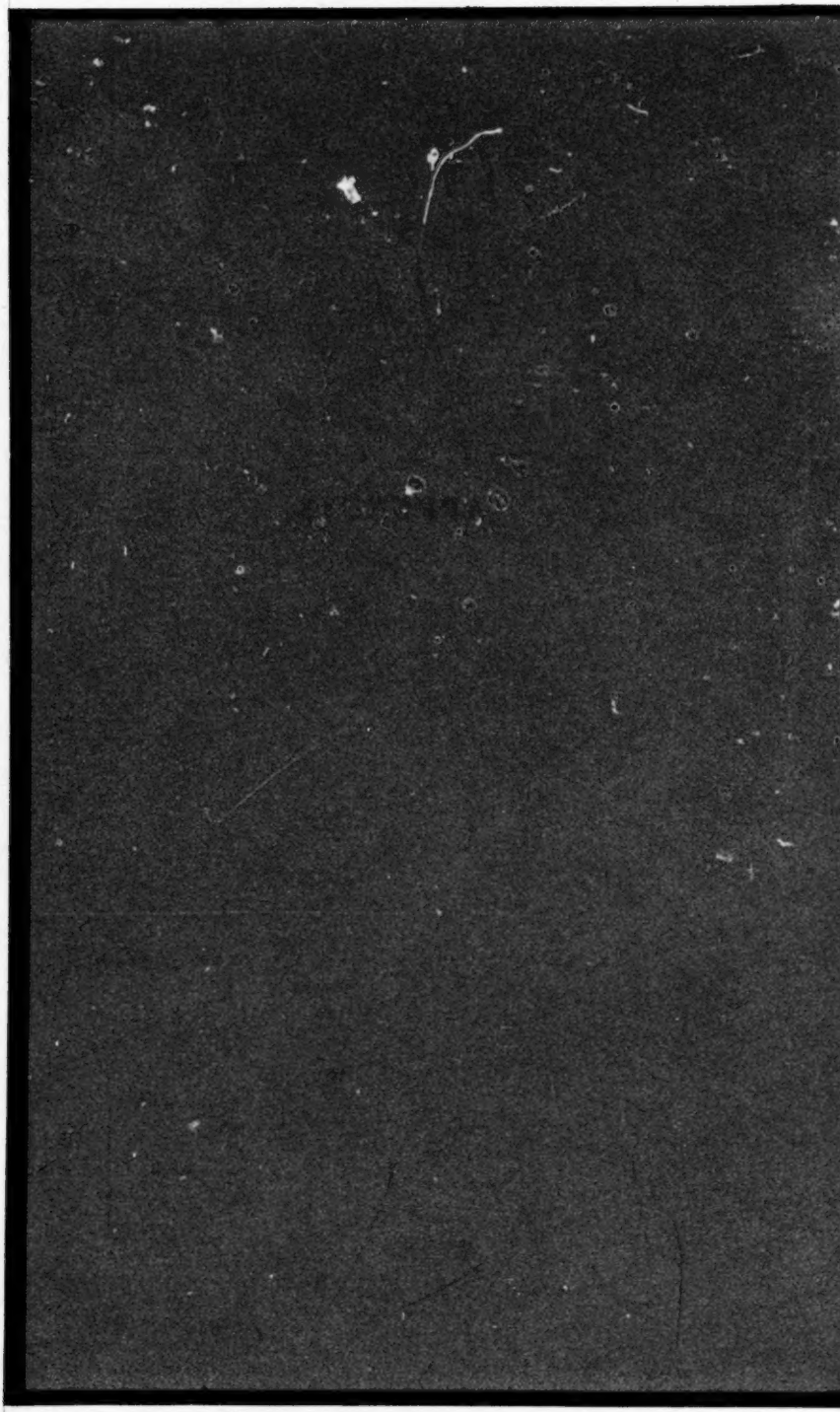
* In *La Fleur,* Mr. Justice Stewart, writing for the Court, relies on a rational relationship analysis only as regards the proffered interest of continuity of instruction, and does so in the context of the requirements of due process rather than equal protection. Mr. Justice Powell's concurring opinion is grounded in the equal protection clause requirement that governmental classifications rationally further a legitimate state interest.

APPENDIX



APPENDIX I

Opinion and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Civil Action No. 72-C-664

ROBERT TIMBERLAKE, BARBARA TIMBERLAKE, PAUL BECKWITH, and LEAH BECKWITH,

Plaintiffs,

—v.—

JERRY F. KENKEL, Inspector of buildings, Village of Shorewood; VILLAGE OF SHOREWOOD, a municipal corporation; BOARD OF APPEALS OF VILLAGE OF SHOREWOOD; and all their employees, agents, attorneys, delegates, successors, and assigns, individually and in their official capacities,

Defendants.

This is a civil rights action in which the plaintiffs seek to have this court declare unconstitutional several sections of the Municipal Code[1] of the Village of Shorewood (herein-

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[1] Plaintiffs specifically attack the definitions of "family" as contained in § 9-101B.2. and § 9-204B.1. of the Municipal Code. Section 9-101B.2. states:

> "FAMILY shall mean an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not be related by blood, marriage or legal adoption, living together in a dwelling unit; included within the definition of a family shall be children placed with a family in a dwelling unit under the provisions

after referred to as the "Code") which in essence prohibits persons from living together in a relationship that does not conform to the family unit as defined by the Shorewood ordinance.

The plaintiffs are two married couples unrelated by blood. They and their children think of themselves as a "family." Specifically, Paul Beckwith, Leah Beckwith, and their children, Christopher and Angela, together with Robert Timberlake, Barbara Timberlake, and their children, Karen and Jeffrey, have been and are living in a residence zoned "single family" by the Village of Shorewood. Defendants are Jerry F. Kenkel, inspector of buildings for the Village of Shorewood; the municipality of Shorewood; and the individual members of the Village Board of Appeals. The reason for this suit is that the plaintiffs' living arrangement is in violation of several of defendants' zoning ordinances.

At the outset, definitional problems arise over usage of the word "family." Defendants define "family" in § 9-101B.2. of their Code as follows:

> "FAMILY shall mean an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not

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of Ch. 48 Wis. Stats., whereby a foster home license is issued, provided that the number of children shall not exceed 4, unless all are in the relationship to each other of brother or sister."

Section 9-204B.1. states:

"• • • Family, within the meaning of this subsection, shall include an individual or 2 or more persons related by blood, marriage or legal adoption, including children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats. whereby a foster home license is issued and the number of children placed thereunder does not exceed 4 unless all are related to each other as brother or sister."

> be related by blood, marriage or legal adoption, living together in a dwelling unit; included within the definition of a family shall be children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats., whereby a foster home license is issued, provided that the number of children shall not exceed 4, unless all are in the relationship to each other of brother or sister."

The plaintiffs call themselves a "family." They, however, define "family" in a different manner than the defendants. Their definition essentially corresponds with one provided in Black's Law Dictionary at 727 (1951): "In broad or primary sense 'family' means: a collective body of any two persons living together in one house as their common home for the time; • • • " and another found in Webster's Third New International Dictionary (unabridged) at 821 (1966) which defines "family" as " • • • a group of individuals living under one roof: HOUSEHOLD • • • ." For the purposes of this lawsuit, plaintiffs and defendants agree that their respective definitions of "family" are not the same and, indeed, are the root cause of the present action. In this opinion, I have attempted to carefully identify whose concept of "family" I am referring to at the particular point in time the word arises.

Jurisdiction is claimed under 28 U.S.C. § 1331, § 1343 (3), and 42 U.S.C. § 1983. This matter is before the court on both defendants' motion to dismiss on jurisdictional grounds and for failure to state a claim upon which relief can be granted and on plaintiffs' motion for summary judgment. Oral argument was heard on all pending motions. I grant the defendants' motion to dismiss the action against the defendant Village of Shorewood, deny the de-

fendants' motion to dismiss as to all other parties, and grant the plaintiffs' motion for summary judgment. I hold that since the zoning ordinance attacked here (i.e., defendants' definition of "family") is not supported by any rational basis consistent with traditional zoning objectives, it therefore violates the equal protection clause of the Fourteenth Amendment.

The present action arose in the following manner. The plaintiffs Paul Beckwith and Leah Beckwith hold legal title to the property as joint tenants. The residence in question is located at 4065 North Richland Court in Shorewood, and consists of a two-story house and lot. The residence is situated within a use district zoned as "Single Family Residence" pursuant to the Village Code. On October 7, 1972, the Beckwiths were joined by the Timberlakes, and they all commenced living together as one family. On October 18, 1972, building inspector Kenkel visited their residence and orally informed them that their living arrangement was in violation of the Code. On November 1, 1972, Kenkel further informed them of that fact by letter and requested that "this violation must be corrected without delay." In addition, the letter asked that plaintiffs contact him if they had any questions concerning the matter. On November 15, 1972, the plaintiffs' attorney wrote a letter to the building inspector requesting additional information about the alleged violation and specifically asking whether the letter of November 1, 1972, was an appealable determination of the Code. Shorewood took this matter under advisement, and plaintiffs initiated the instant lawsuit on December 6, 1972, before defendants responded to their request.

The following facts are set forth in the verified complaint, answer, and affidavits filed by both parties. There

are no material facts in dispute. Paul Beckwith holds title to the premises in question, and these premises consist of a two-story house and lot. The house is the type ordinarily regarded as a single family dwelling. The house consists of a living room, dining room, kitchen, family room, sunroom, study, four bedrooms, and three baths, all making up approximately 2,300 square feet of living space. The premises have been occupied by all the plaintiffs since October 7, 1972, when they formed the present living arrangement. This living arrangement is based on the fact that plaintiffs have voluntarily assumed all of the major tasks involved in the care and upkeep of the premises in question; that the plaintiffs contribute an equal amount to the expenses connected with their living arrangement including monthly payments on the mortgage, utility bills, expenses for repair, and maintenance of the premises, and food, furnishings, and household items used by all; and that the plaintiffs also prepare and eat meals together and share the rooms such as the library, study, workroom, and laundry. In their first affidavit, plaintiffs explain the reasons why they live as a one-family unit. Robert Timberlake is an ordained minister of the United Presbyterian Church; Leah Beckwith and Paul Beckwith are both members of the church, Paul currently serving as a ruling elder and Leah serving as a teacher; and Barbara Timberlake has been active in church work. Each of them adheres to three basic tenets of "orthodox" Christianity; i.e., first, love thy neighbor; second, create stable marriages; and three, liberate the sexes from traditional stereotypes and sex roles. Due to these beliefs, and prior to living together, plaintiffs desired to share the duties of child rearing equally between husband and wife, but one husband's work day prevented this. Plaintiffs wanted to

make available to their children the emotional support of the extended family with several adult figures present, but this was impossible because their nearest blood relatives were hundreds of miles away. Therefore, it seemed true to their beliefs and desires that they establish one family.

In their second affidavit, plaintiffs add that Robert Timberlake and Barbara Timberlake paid $5,000 of the down payment of $10,000 and contribute one-half of the monthly mortgage payments; that all expenditures for food, repairs, capital improvements, and utilities are divided equally between the parties; and that the plaintiffs believe the sharing of work, economic burdens, and living space is an integral part of their living experience.

In his affidavit, defendant Kenkel states that in 1970 the population of the Village of Shorewood was 15,576 residents; that there were 6,017 housing units, 2,375 of which were single family and 3,681 of which were multi-family structures; that the Village provides more than an adequate opportunity to purchase multi-family structures without violating the Code; and that the Beckwiths purchased a residence in an area zoned single-family without notifying the Village that they and the Timberlakes were going to live together as one family.

The affidavit of the seven duly-elected trustees[2] of the Village of Shorewood state that they can enact, amend, and review zoning laws; that they reviewed the definition of "family" as contained in their Code; and that they believe that their definition of "family"[3] is substantially re-

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[2] Chester Krizek, Allan J. Klotsche, George W. Bolln, David Keyser, Grace Abramson, James H. Larson, and Edward L. Heidenreich.

[3] See § 9-101B.2., supra n. 1.

lated to the public health, safety, morals, and general welfare of the Village in twelve respects which basically fall within the following four categories: it preserves the residential character of the community; it preserves residential property values; it controls population density and therefore insures the availability of better services to Village residents; and it protects the cherished ideals of the family and preserves the high moral character of the Village.

Mr. Ralph von Briesen states in his affidavit that he was the former owner of the property in question at 4065 North Richland Court; that he sold it to the Beckwiths; that at no time was he aware that the Beckwiths were planning to occupy the residence with the Timberlakes; and that the Beckwiths led him to believe that only they and their children were going to occupy the premises.

I. *Procedural Questions*

In their complaint, plaintiffs specifically allege that their rights under the Fourteenth Amendment have been abridged by an arbitrary classification which interferes with several of their rights, among these being the First Amendment rights to free exercise of religion and freedom of association; and further, the right to privacy, whether founded in the Fourteenth Amendment, the Ninth Amendment, or the penumbrae of various amendments. Additionally, plaintiffs allege that they have been deprived of their constitutional right to travel and settle where they please. I find that the complaint properly alleges that the defendants have infringed a federally guaranteed right, privilege, or immunity secured to the plaintiffs by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens. Thus, the

requirements of 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 are satisfied.

Defendants briefly argue for abstention by this court. Such a course of action has traditionally been justified only where there has been an ambiguity in the application and interpretation to be given a state or local law. *Zwickler* v. *Koota*, 389 U.S. 241 (1967). Such is not the case here. The state or local statute is not ambiguous. All the parties agree that the conduct the plaintiffs wish to pursue is clearly contrary to the written municipal ordinance.

Defendants further assert that the present action should be dismissed because plaintiffs have not exhausted their administrative remedies. They allege that since zoning is peculiarly a local problem, and since the State of Wisconsin has provided a procedural mechanism (§ 62.23(7)(e))[4] for seeking zoning changes, plaintiffs should be required to pursue their remedies at a lower level than the federal district court. The United States Supreme Court held in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), that the goals of the Civil Rights Act may not be defeated because relief was not first sought under a state law which provided a remedy. The Court stated:

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[4] Section 62.23(7)(e)7, Wis. Stats. (1971), states in part:

"The board of appeals shall have the following powers: To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. * * *"

> "* * * It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. * * *"

In the instant case, it further appears that plaintiffs' claim that their civil rights have been deprived (under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983), is based entirely on federal law, there being no underlying issues of state law. Therefore, *McNeese* v. *Board of Education,* 373 U.S. 668 (1963), controls and plaintiffs do not have to exhaust their administrative remedies.

Defendants have also moved for dismissal of the action as against the defendant Village of Shorewood on the ground that 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 do not apply to municipalities. The Village of Shorewood is a municipal corporation formed pursuant to the laws of the State of Wisconsin. The United States Supreme Court additionally found in *Monroe* v. *Pape,* 365 U.S. 167, 187-192 (1961), that a municipality is not within the purview of § 1983. The Seventh Circuit carved out an exception to this, finding that actions for equitable relief were maintainable against municipal corporations under § 1983. *Schnell* v. *City of Chicago,* 407 F.2d 1084 (1968); *Adams* v. *City of Park Ridge,* 293 F.2d 585 (1961). Recently, however, the Supreme Court corrected this approach by stating that § 1983 did not have a bifurcated application to municipal corporations depending on whether equitable or monetary relief was sought. *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973). Therefore, as against the defendant Village of Shorewood, plaintiff's action for equitable relief should be dismissed. Concerning this dismissal, there is nothing

n the record to allow me to conclude that there is more han $10,000 in controversy, and thus to find an alternative ground of jurisdiction, that of 28 U.S.C. § 1331, on which o base jurisdiction over the defendant municipality. See *City of Kenosha* v. *Bruno*, supra, at 516 (Mr. Justice Brennan, concurring).

II. *Substantive Questions*

The standard with which I begin is that presented in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In *Euclid* the owner of a parcel of unimproved land contested the constitutionality of several zoning ordinances which set minimum lot sizes, maximum building heights, and prohibited, for example, the use of land for apartments. The United States Supreme Court, in upholding the ordinances, stated:

> "• • • while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." 272 U.S. at 387.

The Court continued:

> "• • • the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions

> are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [Citations omitted.]" 272 U.S. at 395.

Shortly after the decision in *Euclid,* the Supreme Court showed itself willing to rule against zoning ordinances. In *Nectow* v. *City of Cambridge,* 277 U.S. 183, 188 (1928), the Court specified a standard to be examined in finding a zoning ordinance unconstitutional:

> "* * * The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited * * * such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. * * *"

Thus, from the very beginning it was realized that although almost every zoning ordinance represented a restriction upon a citizen's right to use his land, and although these zoning ordinances may in general be a proper exercise of governmental power, it was equally possible that they may constitute an illegitimate restriction of a citizen's rights unless supported by a substantial public purpose. In the early cases the constitutionality of the local zoning laws was attacked under the due process clause. Today, however, as was stated in *Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 813 (2d Cir. 1973): "To the requirement that zoning laws satisfy due process, as thus enunciated by *Euclid* and its brethren, there must be added the important condition that they not discriminate in violation of the Equal Protection Clause." The possibility that the

standards of substantive due process will be utilized by the federal courts to analyze zoning ordinances is remote. See Note, "The Equal Protection Clause and Exclusionary Zoning After *Valtierra* and *Dandridge*," 81 Yale L.J. 61, 66 (1971).

Debate over the constitutionality of the Shorewood zoning ordinance has therefore evolved around the question of whether or not the requirements of the equal protection clause are satisfied. Firstly, the parties are in agreement that the ordinance does not raise an issue as to a "suspect" classification. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Graham* v. *Richardson*, 403 U.S. 365 (1971); and *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Secondly, I do not feel that I should, for reasons hereinafter stated, decide whether there has been an abridgement of "fundamental" rights. Consequently, the present case does not fit into any of the categories requiring application of the compelling state interest test.

Plaintiffs argue to the contrary—that their fundamental rights have been abridged. They place much weight on the theory that if not allowed to live as one family, their right to religious freedom will be abridged. Plaintiffs specifically describe their religious beliefs and the manner in which these beliefs motivate their lives. They cite the case of *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), for the proposition that "* * * only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Plaintiffs additionally argue that if they are not allowed to live as one family, they will be denied their constitutional right of association. They add to this the feeling that in dealing with freedom of association involving a set of relationships as intimate as those between the plaintiffs, it

is inevitable that the right become intermingled with the right to privacy as articulated in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). See also *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, 410 U.S. 113 (1973). Based on these cases, the plaintiffs present the following argument: that if it were possible to design the "zone of privacy" discussed in *Griswold*, the home would lie at the very center, and within the home the association of the individuals who lived there would in turn occupy a central position. Defendants contend, however, that these are not the objectives of the Shorewood zoning ordinance. They argue that, in fact, the opposite is true, for Shorewood has established twelve different zoning districts[5] in an effort to provide opportunities within the Village for all options. Defendants further allege that not only did zoning allow complete development to suit the living patterns sought by individuals like the plaintiffs but that there are numerous structures so developed.

According to the present methodology of the United States Supreme Court in these matters, I need not resolve

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[5] Section 8-302 of the Municipal Code divides Shorewood into twelve districts known as:

1. Lake Drive Residence District
2. Single Family Residence District
3. One and Two-Family Residence District
4. Estabrook Homes District—Residential
5. Estabrook Homes District—Business
6. Apartment House District
7. Multi-Family District No. 1
8. School, Church and Public Building District
9. Hospital Zone District
10. First Business District
11. Third Business District
12. Planned Development District

these questions; that is, whether or not the zoning ordinances in question serve to infringe the plaintiffs' fundamental rights to religious freedom, freedom of association, or privacy. While the rights alleged by plaintiffs are "fundamental" in the context of the specific cases in which they are defined, I am not going to decide that an extension of those cases to the present fact situation is justified. Hence, I do not decide the issue of fundamental rights.

Certainly the rights claimed by the plaintiffs are important. Although it is clear that it is not within the province of the court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws, it is also evident that the equal protection clause has lost none of its bite.[6] See *Chicago Police Dep't* v. *Mosley*, 408 U.S. 92 (1972); *James* v. *Strange*, 407 U.S. 128 (1972); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Jackson* v. *Indiana*, 406 U.S. 715 (1972)

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[6] See generally Gunther, "The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972). Gunther illuminates the path taken by the Supreme Court during the 1971 term in the area of equal protection by stating at page 20:

> "The mood is far different in last term's interventionist invocations of old equal protection formulas. In terms of the long-standing connotations of the old equal protection, the decisions are novel if not bizarre. Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentations is substantially narrowed."

(decided on alternative grounds); *Sugarman* v. *Dougall*, —— U.S. —— (decided June 25, 1973); and *In re Griffiths*, —— U.S. —— (decided June 25, 1973). These cases make it clear that in most instances the Supreme Court has replaced the rigid "two-tiered" formula with a more flexible approach.

In the absence of a suspect classification and/or a fundamental interest, the question is whether the legislative distinction is arbitrary and without rational relationship to a legitimate legislative objective. As the Supreme Court recently stated in *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971):

> "* * * this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the object of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the particular statutes involved]."

Thus, I am to consider the nature of the unequal classification attacked, the nature of the adversely affected rights, and the governmental interest urged in support of the classification. This appears to be a more realistic methodology than that formerly used under the two-tiered formula, since sometimes in cases where no suspect classifications or fundamental rights were at issue, blatant inequalities went unchecked. This approach is particularly appropriate in the instant case where individual human rights of opposing groups are involved rather than issues concerning business regulations. *Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 815 (2d Cir. 1973). See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4 (1938); Tussman and tenBroek, "The Equal Protection of the Laws," 37 Calif.L.Rev. 341, 373 (1949). Furthermore, this approach is especially appropriate because the instant case involves delicate and difficult questions of local planning, a consideration counseling a more restrained form of review. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

The nature of the plaintiffs' adversely affected rights having already been examined, I must inquire whether the defendants have shown that the classifications in question here are rationally related to a legitimate governmental interest. Identifying the municipality's purposes in the passing of an ordinance is not an easy task. Here, the declared policy of the Shorewood zoning ordinances is ordained by the Village Board as follows: "It is hereby determined that public health, welfare, morals and convenience shall be protected, promoted and conserved by the regulations contained in this ordinance." See § 8-301, Code. Defendants have submitted the affidavit of the seven trustees of the Village Board. In this affidavit the trustees

essentially assert that the challenged ordinance should be upheld as rationally related to the clearly legitimate governmental interests of (1) preserving the residential character of the municipality, (2) preserving its residential property values, (3) establishing population density control, and (4) preserving the high moral standards of the community. In their brief, defendants repeat this line of thought with the exception that they do not seriously argue that single-family housing as defined by the ordinance preserves the high moral character of the community. It therefore appears that defendants do not present this as one of the legitimate governmental interests to be weighed in considering the constitutionality of the statutes.

What is contended here is, in essence, that by adopting a "single-family" zoning ordinance for certain areas within the Village (1) single families are more likely than families with more than three unrelated members to preserve the residential character of the municipality; (2) single families are more likely than voluntary families to preserve residential property values; and (3) single families are more likely than voluntary families to be smaller in size and, therefore, more in accordance with population density control standards.

I am guided by the recent Supreme Court decision in *U. S. Dept. of Agriculture* v. *Moreno*, —— U.S. —— (decided June 25, 1973). In *Moreno* the Court found § 3(e) of the Food Stamp Act to be unconstitutional as it differentiated between two classes of individuals, one class being composed of those individuals who live in households, all of whose members are *related* to each other, and the other class consisting of those individuals who live in households containing one or more individuals who are *unrelated* to

the rest. The Court found this distinction between *related* and *unrelated* persons to be wholly without any rational basis and therefore invalid under the due process clause of the Fifth Amendment. The situation in *Moreno* is not unlike that found in the instant case.

In *Moreno,* the Supreme Court specified that an examining court should analyze other sections of the statute in question in considering whether these sections accomplish the same results as those envisioned for the particular section in question.

The Code of Shorewood provides other means than the "single-family" zoning provision to deal with the problems of preservation of the residential character, preservation of the residential property values, and establishment of population density control. For example, § 8-304 of the Code states in subsection E that it shall be unlawful to maintain or erect any coop or pen for poultry, rabbits, cows, etc.; that rooming houses are prohibited in the Village; and that the construction of filling stations shall be restricted. And § 8-306 provides in subsection A that no trade, business, or profession shall be carried out from a "Single Family" residence; that it is unlawful to erect or maintain any building for church, school, museum, hotel, hospital or sanitarium purposes, or apartments designed for residence usage; and further provides in subsection B that the size of residential lots is regulated as not being allowed with street fronts of not less than 50 feet and with areas of not less than 6,000 square feet; that no "single family" residence building can occupy more than 30 per cent of the area of an interior lot nor more than 40 per cent of a corner lot. Subsection C provides set regulations and subsection D provides maximum height regulations for single family residences. The existence

of these provisions shows that there are other ways to preserve both residential character and property values, and also establish population density control. These latter provisions are as responsive to those alleged goals as the provision that more than three unrelated individuals cannot live together in an area zoned "single-family."

Defendants' allegations that the zoning ordinances are rationally related to the clearly legitimate governmental interests of (1) preserving the residential character of the municipality, (2) preserving residential property values, and (3) establishing population density control, must be individually examined. I find that the means utilized by the Village of Shorewood, that of "single-family" zoning, not to be rationally related to any of the three government interests listed above. I also find that less onerous means exist to reach these same ends. For the purposes of this examination, I assume, without deciding, that the reasons given for defendants' zoning ordinance are valid legislative goals.

Defendants argue first that "single-family" zoning ordinances preserve the residential character of the community. They state that prior to zoning, haphazard conditions existed in municipalities respecting the location of buildings and uses for dwellings, trades, and industries, commercial and otherwise. After the advent of zoning, municipalities then became able to regulate building development and the use of property by classifying three broad categories of uses: districts devoted entirely to single-family residences on a prescribed minimum lot, districts in which multi-family structures are permitted, and business districts subclassified into several districts with different uses in each. In this traditional zoning argument, defendants argue that single-family zoning con-

trols congestion in the streets and the use of open spaces within the community. This is not a persuasive argument. One characteristic of suburban growth in the United States has always been the ability of the suburbs to absorb rapid population growth. Note, "Exclusionary Zoning and Equal Protection," 84 Harv.L.Rev. 1645, 1667 (1971). Defendants' viewpoint that voluntary families would not preserve the residential character of the community is pure speculation. Such a conclusion is entirely unsupported by the evidence, and I am unable to judicially notice it.

While the aesthetics of the community is a desirable value, the means approach requires that I inquire as to whether "single-family" zoning implements this at too high a cost or whether the same end could be reached by less onerous means. As I mentioned previously, the Shorewood ordinances already include several provisions insuring a maintenance of the high aesthetic quality of the community. I find such provisions as set-back requirements, size of lot, and height regulations to be more rationally related to aesthetic considerations than the "single-family" requirement.

Defendants further argue that the "single-family" zoning ordinance preserves property values. Defendants' argument cuts both ways. They indicate that the single-family ordinance provides for a stable community of citizens and prevents inflated property prices and inflated rentals. At another point, however, they imply that the end of single-family housing will make the community less aesthetic, will result in more traffic and more children, will reduce the quality of police, fire, transportation, and educational services and, consequently, will drive property values down. The contradictory approach that defendants

take here persuades me that their arguments are nothing but mere conjecture. Here again, defendants have not introduced one iota of evidence into the record in support of their theory. Several commentators have noted that changes in the social composition of a municipality do not necessarily affect property values. L. Laurenti, *Property Values and Race* 47 (1960); Note, 84 Harv.L.Rev. at 1666. To theorize otherwise, without a proper record, is beyond the power of this court.

Defendants finally argue that "single-family" housing is a means of controlling population density. Defendants assume that their definition of "family" is self-limited and that the plaintiffs' "family" can be any size whatsoever. This argument is again mere speculation. No statistical information has been presented to the court in support of this proposition. If control of population density were the real goal of the ordinance, the definition of "family" found in § 9-101B.2. would not provide for the respective inclusion of those individuals related by marriage to members of the family and, therefore, would not allow a situation to exist whereby numerous brothers and sisters could live together with their respective spouses, along with foster children, and still be considered a "single-family" under the ordinance. See *City of Des Plaines* v. *Trottner*, 216 N.E.2d 116, 119 (1966). Furthermore, if the ordinance was designed to limit population density at the same level as that existing in nuclear family units, it would not limit the number of unrelated individuals to three per single-family housing unit. This figure is without a doubt lower than the size of the average nuclear family. As was stated

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[7] Gunther, supra, pages 11-12, states that of the fifteen cases in his study, the constitutional challenge was rejected in only four: *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Schilb* v. *Kuebel*, 404 U.S. 357 (1971); *Richardson* v. *Belcher*, 404 U.S. 78 (1971).

in *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973), at 817:

> "• • • Assuming such a purpose, a more permissive ordinance would suffice. Furthermore, such an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit. • • •"

In conclusion, there is no rational basis for the ordinances in question, and there are less onerous means to achieve the desired ends. Some of these already are in the Municipal Code and some more could be adopted.

The defendants argue that other housing is available to the plaintiffs within the municipality of Shorewood. This argument is not persuasive because it assumes that the original classification was a national one, and for the reasons stated above, I have found that it was irrational, and an irrational classification is not saved because one can escape its irrationality by living elsewhere. In *Boraas* v. *Village of Belle Terre,* supra, the municipality was totally zoned single-family. The Second Circuit did not agree with the municipality's argument that any constitutional infirmity was swept away by the fact that single-family housing was available in other surrounding communities which were not similarly zoned. The Court stated at 817:

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[8] The two districts exclusively zoned single-family are (1) the "Lake Drive Residence District," and (2) the "Single Family Residence District." These two districts essentially run north and south, following the Lake Michigan shoreline, and correspond with the most attractive area in the Village of Shorewood.

"• • • The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled, subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970), affirming 312 F.Supp. 692 (D.R.I. 1970). • • •"

In conclusion, the attacked provisions of the Code[9] have not been shown to be supported by any rational basis which is consistent with permissible zoning objectives. They must, therefore, be held to be unconstitutional as in violation of the equal protection clause of the Fourteenth Amendment.

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment be and it hereby is granted.

IT IS FURTHER ORDERED that the defendants' motion to dismiss this action as against the municipality of Shorewood be and it hereby is granted, and the defendants' motion to dismiss as to all other parties be and it hereby is denied.

Dated at Milwaukee, Wisconsin, this 8th day of January, 1974.

JOHN W. REYNOLDS
U. S. District Judge

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[9] See footnote "1" above.

MOTION FILED

MAR 18 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

THE VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,
Defendants-Appellants,

vs.

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,
Plaintiffs-Appellees.

On Appeal From a Judgment of the United States Court of Appeals for the Second Circuit

MOTION FOR SPECIAL LEAVE TO FILE AMICUS CURIAE BRIEF

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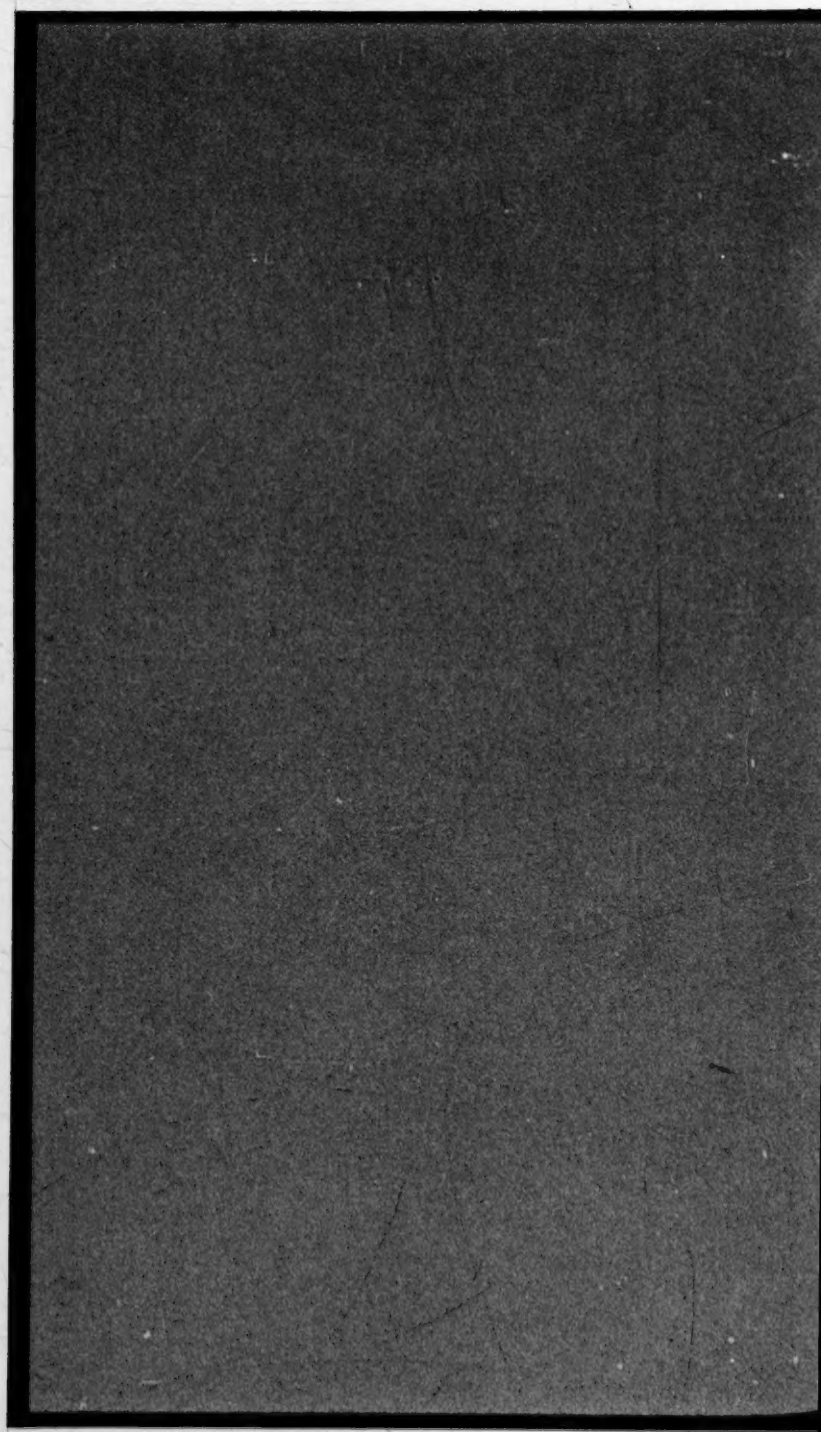

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MOTION FOR SPECIAL LEAVE TO FILE AMICUS CURIAE BRIEF

Comes Now the Undersigned, for and on behalf of New Communities, Inc., a Minnesota non-profit corporation and moves the Court for Special Leave to File an Amicus Curiae Brief.

INTEREST OF AMICUS

The special interest of Amicus is set out at greater length in the Brief heretofore forwarded to the Clerk of Court. As summarized, the issues involved in the above litigation fall within the specific area of societal concern for which this non-profit corporation was formed; thus Amicus has a special interest in this litigation and the decision of the Court herein because it goes to the heart of the educational and social program of the corporation.

SPECIAL INTEREST PRESENTED

Amicus Curiae in its brief emphasizes the contractual nature of the relationship of persons involved as appellees in this litigation. The issue of the right of contract as a constitutional right does not appear to have been brief or explicitly covered in the arguments presented by the parties. It is this constitutionally protected right of contract, i.e. the right of citizens to enter into contracts with each other in formulating and defining of households, which is the basic legal assumption of great concern to Amicus.

THE EXPLANATION OF THE TIME OF FILING

It was not until Amicus Counsel received a copy of the Appellee's brief the early part of January that the members of New Communities, Inc., were able to ascertain the nature of the legal arguments involved in this appeal by the Village of Belle Terre. The first meeting of the membership was not held until February 1st, 1974, at which time the filing of the Amicus Curiae Brief was authorized provided the Board of Directors could secure or raise the funds to pay for the same. It was about the middle of February when final authorization was made and a for-

mal request was made to Appellee's Counsel for their consent to file; and it was at this time, the brief having already been prepared for printing, that Amicus Counsel learned the matter had been orally argued on the 20th of February, said time being a much shorter time than what Amicus Counsel had anticipated, based upon past experience, between the submission of the briefs and oral argument.

By reason of the great importance of the issues in this case to Amicus Curiae, and many other persons, Special Leave is requested of the Court to permit and authorize the Clerk to file the Amicus Curiae brief in this matter.

Respectfully submitted,

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The consent of Appellees has been previously obtained and delivered to the Court for filing, the consent of Appellant's has been requested. But Amicus prays the exercize of the discretion of the Court in approving the filing of said brief with or without the consent of appellants.

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SUPPORTING PETITION ON BEHALF OF APPELLEE BY AMICUS CURIAE NEW COMMUNITIES, INC., A MINNESOTA NON-PROFIT CORPORATION

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SUPPORTING PETITION ON BEHALF OF APPELLEE BY AMICUS CURIAE NEW COMMUNITIES, INC., A MINNESOTA NON-PROFIT CORPORATION

INTEREST OF AMICUS

New Communities, Inc., is a Minnesota Non-Profit Corporation organized for the specific purpose of assisting and aiding, by educational and informational means, those per-

sons who seek a more meaningful life and the greater freedom that comes from shared living experiences with compatible and concerned people. The concepts involved in the ideas categorized as "the extended family", "communal living" and "open marriage",* together with the personal growth that comes from living a sharing and cooperative life, are all matters of primary concern to the members of New Communities, Inc. Membership is composed of persons who are living in collective associations, persons who are considering doing so, persons who have marriage contracts and seek by the concepts and associating with like-minded persons in the gatherings of New Communities to better their own understandings and relationships, and other individuals who seek to better their associations and their communications with other people. Most of the members of New Communities, Inc., look upon the current concept of marriage, defined as a "husband-wife-children" categorization, as a role-casting relationship which isolates people from each other. Such defined role relationship is today being classified as the "traditional" concept of family; but historically this is not accurate because until recent times a family consisted of more people of many ages and relationships living together, not so much in categorized roles as on a group-concern for each member of the family as a person. It is the concept of the limited role-defined "family" that is all too often sought to be frozen into the laws of "bed-room communities" today. This is an attempt to impose rigid mores on society. Under the guise of zoning ordinances, certain persons, using the police power of the government, are seeking to

*A concept of marriage as an equal partnership with both spouses having the individual ability to lead their own lives and have their own occupations and associates.

impose their "moral values" upon other persons. Since members of New Communities, Inc., see such action as contrary to a live, healthy, and libertarian society, such ordinances as those in this case are a grave social concern to the members of New Communities, Inc.

The issues involved in this litigation fall within an area of concern for which this non-profit corporation was formed and thus Amicus has a special interest in this litigation and the decision of the Court.

AMICUS SUPPORTS APPELLEE'S POSITION

The concepts of the Right to Travel and Right of Privacy under the umbrella of the Constitutional guarantee of Equal Protection as heretofore enunciated by the Courts has been so well researched and argued in Appellee's brief that no attempt is made by Amicus to repeat the arguments. Amicus urges the Court to adopt the position of Appellees and affirm the soundly reasoned decision of the Second Circuit Court of Appeals as reported in 476 F.2d 806. However, this brief is submitted to the Court to establish that there are other and additional rights upon which the Court may decide the issue in favor of the Appellees, based upon direct and substantial rights.

AMICUS CURIAE POSITION

STATEMENT OF FACTS

The essential and pertinent facts of concern to Amicus and stated here for purposes of Americus brief are as follows:

1. The Village of Belle Terre adopted a zoning ordinance creating a single family residence area and defining a family as follows:

"One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."
Article I, §D-1.35a (June 8, 1970)

2. The plaintiff-appellees consist of the owner of a single family residence in the Village of Belle Terre, which has six bedrooms, rented to a group of six students, at a nearby college, which students were without blood relationship, but were organized as a single household and sharing in the duties and obligations of the single tenancy of the property, three of whom are plaintiff-appellees in this cause.

3. The Village of Belle Terre threatened to enforce the ordinance against the Plaintiff-Appellees, who then instituted this injunctive action in the Federal District Court against the Defendant-Appellants, and injunctive relief was granted in the lower courts.

4. That it is a matter of common knowledge that similar ordinances generally are a part of the zoning codes in municipalities throughout the United States; and that such ordinances, most of which were enacted in relatively recent times, are a great concern of Amicus.

For a more detailed statement of facts as relied upon by Amicus, see 476 F.2d, pages 808 to 810.

STATEMENT OF ISSUES

1. Do the six persons have a right to live together as a single household by agreement between themselves as a

Contract Right; and do they have this as a right of Association?

2. Can a governmental interest, under a zoning ordinance, be so worded and applied by a municipal government as to infringe upon these rights of contract and association without violating the constitutional rights of persons such as the plaintiff-appellees here?

3. Can there be a governmental interest in creating a distinction and discriminatory classification by number of person based upon a "blood" as contrasted to a "non-blood" relationship, and can a governmental interest support a distinction between a marriage contract and other contracts to form a common household, under the guise of a zoning ordinance, i.e., a land use ordinance?

GENERAL STATEMENT

It is the position of Amicus that there are two basic Ninth Amendment Constitutional Rights involved in this matter. The one is the Right to Contract and the other is the Right of Association. The Ninth Amendment provides as follows:

"Article IX

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Like other "rights", those under the Ninth Amendment must be considered basic powers of the individual, but they are not unlimited licenses. They are rights of responsible conduct. Like other rights, they cannot be exercised in an unlawful manner, a manner that causes destruction or obstruction to other persons, or exercised so as to deny

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."
> Article I, §D-1.35a (June 8, 1970)

2. The plaintiff-appellees consist of the owner of a single family residence in the Village of Belle Terre, which has six bedrooms, rented to a group of six students, at a nearby college, which students were without blood relationship, but were organized as a single household and sharing in the duties and obligations of the single tenancy of the property, three of whom are plaintiff-appellees in this cause.

3. The Village of Belle Terre threatened to enforce the ordinance against the Plaintiff-Appellees, who then instituted this injunctive action in the Federal District Court against the Defendant-Appellants, and injunctive relief was granted in the lower courts.

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the same right or some right to other persons. This is the same "governmental interest", "due process" and "equal protection" legal difficulties which make the application and generalization of Constitutional Rights the thorny problem that it is. But it is the position of Amicus that the Court should recognize and use one or both of the rights stated above as an additional basis in affirming the decision of the Second Circuit Court of Appeals in this matter.

THE RIGHT TO CONTRACT AS RECOGNIZED

Many cases have dealt with and spoken of the "right to contract"; but have treated the subject as though this was an "inferred right" from other Constitutional sources and not as a direct right "retained by the people". But the Courts have dealt with the problem in fact as though this was a primary and direct right. Thus in *Allgeyer v. Louisiana*, 165 U.S. 578 at page 589,

> "The Supreme Court of Louisiana says that the act or writing within that State, the letter of notification, was an act . . . prohibited by statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. . . . The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

As will be discussed later in this brief, page 13, et seq., many cases assume there is a right to contract and then find the statute involved to be a valid limitations upon the right by giving reasonable definition to what is societal and responsible conduct.

In considering the right to contract as a Ninth Amendment right it should be noted that even before the adoption of the Fourteenth Amendment, the framers of the Constitution in Article 1, Section 10, provided:

> "Section 10. No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver coin a tender in payment of debts; pass any Bill of Attainder, ex post facto law, or *law impairing the Obligation of Contracts,* or grant any Title of Nobility." (Italics supplied).

See also: *Coppage v. Kansas,* 236 U.S. 1, 50 L.Ed. 441, 35 S.Ct. 240, wherein the Court upheld as a "contract right" of the employer to require that an employee not join a union. Amicus counsel believes the better law is expressed in the dissenting opinion of J. Day and Hughes on page 42 as follows:

> "I therefore think that the statutes of Kansas . . . did not go beyond a legitimate exercise of the police power, when it sought not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may expect from another as a condition of employment. Entertaining these views, I am constrained to dissent from the judgment in this case."

and *Holden v. Hardy,* 169 U.S. 366, 42 L.Ed. 780, 18 S.Ct. 383, wherein the Court held it within the power of the state to prescribe minimum hours in the mining industry because

of the hazard involved to the health of the laborer, note the words of the Court, on page 397.

> ". . . In other words the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself . . ."

It is Amicus position that the air should be cleared and the right to contract set out as a right unto itself (taking along with it many others, such as, to enumerate but a few, the Right of Privacy, the Right to Travel, the Right to choose one's association, the Right to Education). These are all valuable rights "retained by the people" to each individual, upon an equal footing with the Right to choose one's religion, the Right to speak, the Right to print and publish, the Right to petition the government, the right of jury trial, the Right to Counsel of one's choosing. It should be noted that these are different concepts of "rights" from those of "due process", "equal protection" and "no review other than under the rules of the common law", which are procedural matters to be assured to each individual by the judicial system. Without these procedural rights, obviously, all the others break down or disappear, thus in our common law court system, we keep returning to the procedural rights in defining the others. But this is not to say that basic substantive rights should not be recognized as primary Constitutional Rights standing on their

own as those "retained by the people" under the Ninth Amendment. Amicus urges this.

The difficulty confronting lawyers and Courts today is that these necessary concepts of liberty must be approached and argued indirectly. If the Right of Privacy were recognized as a Ninth Amendment Right would the problems of *Alderman v. U.S.*, 374 U.S. 165, and other cases dealing with eavesdropping and surveillance cause the difficulty they do? We also have the situation of the flag saluting case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1171, 63 S.Ct. 1178, wherein the Court says:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the state to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the right of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stands on a right of self-determination in matters that individual opinion and personal attitude."

There are also such cases as *U.S. v. Sisson*, 294 F.Supp. 511, 399 U.S. 267 (affirmed on other grounds) where an eminent jurist has a basic reaction to a given situation. It is Amicus position that the Court should recognize such situations and instead of looking to the procedural rights of the Fifth and Fourteenth Amendments as a basis for de-

ciding such cases, should look to the Ninth Amendment, which is as much a part of the Bill of Rights as the First and Fifth Amendments. Thus would those dealing with these problems in the law be able to deal directly with the rights and whether the limitation sought by a given regulatory statute or ordinance infringed upon them or defined responsible conduct.

WHAT ARE "RIGHTS" "RETAINED BY THE PEOPLE"?

(While this could be the subject of a lengthy treatise not consistent with the legal argument of an appellate court brief, yet Amicus counsel feels justified in making a limited explanation of the concepts going beyond the limited Right to Contract and the Right of Association, both of which are a vital concern to Amicus, which are involved in Ninth Amendment rights, with the hope that a short explanation will be of some assistance to the Court in evaluating the validity of Amicus position.)

Clearly by its terminology the Ninth Amendment was intended to cover many "rights". These, together with those others specifically mentioned in the Constitution can be generalized as the concept of "liberty". Thus, if we come to understand "liberty", we can better understand the problems. Does "liberty" exist because a government grants it, or does "liberty" exist because it has within it some inherent and almost universal human response? It is a sense and a feeling within a human being that "it" is necessary for his own personal life and interference somehow invades his own personal being. Liberty must be distinguished from license, i.e., liberty certainly is not a concept which grants to a person a power over others, or to injure or exploit others. In order to understand liberty one must first understand that this is a concept of thought and re-

lationship. This is much misunderstood because liberty does not primarily pertain to conduct, but rather to a state of mind. A man has no liberty if he thinks of himself as a slave, as a person whose thought or mind is controlled by some other person. Liberty is the process of making a decision, and particularly the decision as to the individual's relations to other members of society. Its essence is socially responsible decision-making. Of course, the individual decisions are useless if he cannot act upon them, thus we many times confuse the acts of the individual with the concept of liberty. We do judge and evaluate each other on the basis of behavior, conduct and acts, and not on the thinking process. It is because the individual's outward behavior reflects his thoughts that we all too easily overlook a basic factor—that liberty is a state of mind and not behavior. But we must also recognize that by controlling the behavior of the individual, the individual's state of mind can be controlled. But just as the concept of life can be said to be absolute and inalienable, so also can we say that liberty is absolute and inalienable. Liberty is a fact which belongs to the individual as absolutely as life itself. We must recognize that the outward manifestations of liberty, i.e., the behavior of the individual, are limited since the essence of liberty is socially responsible decision-making; thus, its manifestations in the form of individual acts cannot be such that the act or acts operate to destroy the liberty, or life, of another. It is not unrestrained activity, but concerned activity. Liberty or freedom, in a societal concept and in a legal context can only be equated with responsibility. To be responsible is to have a concern. Thus, those concepts of individual decision and individual action which a human being must have if he is to be responsible and have a concern must be defined as "liberty".

Throughout any discussion on a concept of liberty lies an underlying minor premise of restraint. A person, or a government, must *not* take affirmative action against another individual which encroaches upon that individual in some manner. It can be stated that a person acting out of a sense of responsibility must not take an action which injuries another. A person has a right to religious freedom, but he cannot act to the detriment and danger of another person. One cannot say that his religion requires human sacrifice and thus justify the taking of another's life. But what is meant by religious freedom is that neither the state nor any other person can, by force or threat, compel another to accept a concept of religion with which he does not agree.

Also, as stated previously in dealing with liberty as a bundle of rights one must recognize the distinction between a "license" and a "right". A right is something inherent to the individual human being. A license is a grant of power. Both in a sense involve the exercise of power, and both have become loosely defined as rights. Thus, a government grants a "fee" in land. This is a license to use the land, or to sell it, or the right to pass this license on to one's heirs. This license having been granted by the government is said to be "rights in land". But when one government takes power over a land area from a different government, it grants rights to this land to certain persons, and those who claim rights in this land from the prior government are no longer considered to have those rights. In this respect, and in many others, such rights in land differ from basic human rights. Similarly a government will grant a franchise to carry on an economic enterprise to certain persons. We speak of such persons as having a right to conduct such business; but this again is really a

license, a power granted by the government, and as such differs from the concept of liberty. A grant of power, a license can have many restrictions placed upon it without there being that sense of feeling that a person's very being is encroached upon. To pursue this further one must turn to the political philosophers who had a great influence upon the framers of the Constitution, such as John Locke, John Stuart Mills and others.

THE GOVERNMENTAL INTEREST CONCERNING THE RIGHT TO CONTRACT

While not entirely applicable, yet some guidelines can be obtained from the cases which have found a governmental interest involved where a claimed right to contract was asserted. These cases deal chiefly with "business" contracts. While a person has right to engage in business, yet it is well established that society has a right to regulate commerce, and thus such contracts, as a part of commerce, may be subject to closer scrutiny than strictly personal contracts as the one in the case at bar. But from these cases we can conclude that while a person has a right to contract, there are overriding societal concerns which are necessary to define socially responsible conduct. In effect such was the holding of the Court in *West Coast Hotel v. Parrish*, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, which sustained the power of state legislatures to enact minimum wage laws for women. It is interesting to note today Justice Sutherland's dissenting opinion in which he raises the question of "equal protection" because of the discrimination between men and women. However, the majority opinion discarded the concept as a side issue because it found the position of women in society to be a part of the "exceptional circumstances" which justified the limitation placed

upon the right to contract. Today we clearly recognize that the "exceptional circumstances" apply to both men and women and that the "equal protection" argument would carry much greater weight. But one must remember that this case was decided in 1936.

Most cases dealing with the right to contract involve some regulatory infringement upon the right. This, as we have seen in the discussion on "liberty" above, is logical because rights are a power to act but such action must be socially responsible, and certainly a reasonable defining of what is socially responsible is proper. Thus Minnesota adopted a statute requiring compulsory arbitration of the evaluation of damages in fire insurance policies and this was attacked as an interference with the right to contract. *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 76 L.Ed. 214, 52 S.Ct. 69, on page 157 the Court says:

> ". . . Without stopping to examine those contentions, we assume that appellant's freedom of contract was restricted by operation of the statute . . .
>
> The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community."

In another situation the State of North Dakota adopted a provision for an implied warranty of fitness for purpose as a part of a Uniform Sales Act, and this was applied by the North Dakota Court in the sale of a combine. The case is *Advance-Rumley Thresher Co. v. Jackson*, 287 U.S. 283, 77 L.Ed. 306. On page 288 the Court says:

> "The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraint as the State in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U.S. 525, 545, 546, and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has the benefit of performance of the other party to a contract will be permitted to avoid his own promise . . .

Then on the next page the Court recites at length the circumstances which justified the limitation upon the right to contract; the language of which in effect says that socially responsible conduct in the circumstances of the case made the statute an acceptable limitation upon the right to contract. There is also the whole field of anti-trust cases in which the right to contract had been raised and the Courts have found that as a reasonable definition of a limitation upon the right, such legislative acts were valid. See: *U.S. v. Joint Traffic Association,* 171 U.S. 505, 43 L.Ed. 259, 19 S.Ct. 25, and many subsequent cases. If one considers these cases on the theory that liberty is a concept of social responsibility with "rights" being the power to carry out that responsibility, then the anti-trust laws are definitions of what is socially responsible in a reason-

able manner. This is a position which fits the whole field of anti-trust legislation into the concepts of the right to contract, and does so in a direct manner without the need of reference to the procedural rights.

In all of these situations, we are dealing with commercial contracts falling within the recognized power of the "governmental interest" in the regulation of commerce. Clearly any person who enters into a commercial contract does so with both the expectation and knowledge that the law must define social responsibility in a reasonable manner to preserve essential fair dealing between people with unequal economic power. Thus commercial contracts must be subject to a substantial governmental interest; but these cases do provide some evaluation of human rights and liberties insofar as the right to contract is concerned. However, Amicus must point out that in the case now before the Court we do not have a commercial contract, we are dealing with a very personal contract, as will be shown later, so there is a basic distinction, which has a similarity to the problem which the Court faced in dealing with a restrictive governmental regulation in *United States Dept. of Agriculture v. Moreno*, — U.S. —, 37 L.Ed.2d 782, 93 S.Ct. 2821.

THE GOVERNMENTAL INTEREST CONCERNING LAND USES

As has been argued the "right to use land" is in reality a license granted by government and readily subject to a substantial governmental interest. However, there must of necessity be the concept of "rights" which protect the individual in his use of land; otherwise, all his other "rights" can be rendered meaningless. Thus, the "right to use land" is not a license in the same sense as a license to engage in a commercial enterprise that creates an imminent danger.

The latter must be subject to extreme scrutiny and readily revocable. Thus the right to use land is a protected right and a favored right and one not subject to easy revocability. But the right to use land has been reasonably limited by the concepts of building and zoning laws. This is proper provided that such laws do not involve "arbitrary restraint" and amount to no more than "reasonable regulation".

It is Amicus' position that permissible and impermissible regulation and restraint have been dealt with so comprehensive and accurately in Appellee's Brief, pages 9 and 10, and 34 to 42, that a recitation here would only be duplicitous.

THE NATURE OF THE CONTRACT INVOLVED AND THE MEANING OF FAMILY

On the bottom of page 813 and top of page 814 (476 F.2d) the Circuit Court of Appeals in this case says:

> "Unquestionably the rights claimed by appellants (plaintiff appellee's now) are important. Certainly they are more personal and basic in nature than those of commercial interests of the type under consideration in Lindsley, supra, and McGowan, supra . . . Nor does the present case fit snugly into any of the other categories recognized as requiring application of the compelling state interest test. Despite the incidental effects of the Belle Torre ordinance, we are not here dealing with a 'suspect' classification such as race . . . or with a law directed against a right of association sought as a means of political expression or action . . ."

on page 810 (476 F.2d) the Circuit Court of Appeals in this case says:

"In his carefully considered opinion Judge Dooling (The District Court trial judge) (recognized) 'that plaintiffs had the unquestionable right to live together in student groupings, free from unwarranted public intrusions, just as traditional families had the right to live in areas restricted to one-family dwellings, he summarized the issue before the Court as follows:

> 'The question ultimately posed is whether it is lawful to have a one-family dwelling zone district which excludes equally small household groups who impose no greater burdens on use of the land than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children.'

"Judge Dooling concluded that the exclusionaire classification could not be upheld on traditional grounds supporting zoning regulations as a valid exercise of state police power . . ."

Amicus calls these to the Court's attention because both the District Court and the Circuit Court recognized that the fact situation did not fit into the categories with which the courts had previously dealt.

What we have involved in this case is a question of whether and upon what terms consenting and agreeing adults have the power to select and determine their own lives in the most personal of all matters: The selection of the persons and the determination of the terms of the personal relationships in the day to day necessities of living, i.e., the household and the nature of the household in which one lives.

The agreement, or contract, between the individuals involved is not connected with commerce. The contract does

not place additional burdens on the land, the contract creates one household and constitutes one tenancy of the premises and is thus consistent with the zoning prescribed—a single family dwelling unit. In no way does the contract operate to exploit or take an unfair advantage of others. It is a contract between the parties because they have determined this of their own choosing and mutual advantages. All of these facts are conclusions which both the trial court and the Circuit Court recognized.

That necessity and choice may cause people to establish a common household has been recognized by the Court as a recent decision in the *U.S. Dept. of Agriculture v. Moreno, supra.*

Any state or municipality, as a part of its criminal code, that sought to make the fact that more than two unrelated persons living together constituted a crime would be hard pressed to find a legal rationale of any kind satisfactory to any Court. Such an enactment would be considered so restrictive, and such a direct contradiction of common human experiences, that it would be struck down immediately. Obviously, if such an enactment could be sustained, then the law could forbid all persons not being a part of a husband-wife-child relationship to establish a common household. What kind of authoritarian society would exist if the governmental interest could be extended so far as to say that one must live with one's parents or live in absolute isolation.

This is the nature of the contract we are dealing with in this litigation. We live in households in common with other persons of our choosing, be they wives, husbands, children, brothers, sisters, cousins and close friends with whom we find compatability. This is a vital part of living

as a socially responsible person, as a free person. To deny to individuals the power to make this determination each for oneself becomes oppressive regimentation.

Men have lived together as "families" seemingly from time immemorable. But what is the legal definition of the family as found by the Courts? The "Family" is considered vital to our society, but legally how has it been defined? Curiously there seems to be little or nothing in recent cases on this subject.

One comparatively recent case arises in Minnesota. See *Tomlyanovich v. Tomlyanovich,* 239 Minn. 250, 58 N.W. 2d 855. In this case the Minnesota Supreme Court searched back into old cases and old authorities. On page 863 (58 N.W.2d) the Minnesota Court cites with approval and quotes the definition of family in 35 C.J.S. 738 as follows:

> "In its primary sense the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof, and has been most frequently defined as meaning, substantially a collection, or the collective body, of persons living in one house, or under one head or manager, . . . More specifically, the word has been defined as a collective body of persons, consisting of parents or children or other relatives, domestics, or servants, residing together in one house or upon the same premises; a collective body of persons who form one household, under one head and one domestic government, and who have reciprocal natural or moral duties to support and care for each other; * * *"

Further on, the Court cites with approval *Robbins v. Bangor Ry. & Electric Co.,* 100 Me. 496, 505, 62A. 136, 140, 1 L.R.A., N.S., 963, where the court said,

> "* * * the word 'family' is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. Dodge v. Boston & Prov. R.R. (Corp.) 154 Mass. 299, 28 N.E. 243, 13 A.L.R. 318. In that sense it has frequently been defined as synonymous with household."

If we turn to Black's Law Dictionary, we find just a general brief statement defining family as a collective body of persons who live in one house or within the same curtilage and under one head or management. Black's Law Dictionary under "family relation" states "a relationship which may exist between one taken into the family by the head of the family, notwithstanding the absence of blood relationship or of legal adoption." *Nelson v. Poormans Estate,* (Mo. App. 215 S.W. 753, 754) "Under 'family use' the definition is 'that use ordinarily made by and suitable for the members of a household, whether as individuals or collectively. *Spring Valley Water Works v. San Francisco,* 52 Cal. 120" also it lists "family expense" and defines it as an "obligation incurred for something intended for the use or comfort of the collection spoken of as a family as distinguished from individual or personal expenses. *Vace v. Wyatt,* 141 Iowa 506 . . ."

The most recent cases dealing with the question of "family" arise under what is known as the "family car doctrine". Under this concept an insured car of a member of household is insured so long as it is operated by a member of that household. These cases are numerous, one of the earlier ones is *Smart v. Bissonette,* 106 Conn. 447, 138 A. 365. See also *Lumberman's Mutual Casualty Co. v.*

Pulsifer, D.C. Me. 41 F.Supp. 249 which is dealt with more fully later.

The word "family" has a number of uses and definitions in our vocabulary. It is used as a classification of groups such as the "cat family", the "dog family" or the "human family". Obviously its usage in statutes and ordinances make this an absurd interpretation. A second usage is as a descriptive word of lineage—thus, we speak of a person's family in the sense of his ancestors and descendants. This is, of course, the interpretation that is used in the construction of wills and the laws of inheritance, but this is hardly apropo as a definition of family under zoning or similar ordinances. A Court has made an interesting distinction in this matter under the family car doctrine. That case is *Lumberman's Mutual Casualty Co. v. Pulsifer*, D.C. Me., *supra*, "A married son of insured", who had left parental home some years before, but who thereafter, together with his wife, and child, temporarily resided with insured while attempting to find a residence to rent, was not a "member of the household" of insured, within "drive other private passenger automobiles in liability policy excluding from coverage other automobiles owned by members of insured's household, and hence insured was covered by policy at time of an accident while driving his son's automobile on an errand. Ordinarily, the word 'household' is synonymous with 'family'. A 'family' is defined as the body of persons who live in one house and under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders. A 'household' is defined as those who dwell under the same roof and compose a 'family' a domestic establishment; family."

Obviously, the Court recognized that even though there

was lineage relationship, yet as an insurable risk, the son's automobile was not a part of the excluded risk not assumed by the insured. The case makes good law.

We come then to the third meaning of "family". The word "family" as used in zoning ordinances must be given the meaning that it is a collective body of persons who share a common household, all of whom have full curtilage rights in the premises, and who maintain such premises as their permanent place of abode and who have a relationship with each other, either by blood or contract. The question of curtilage, which is an old tenancy concept, enters into this picture and establishes a good test as to who is a member of the household. Every member of the household has full curtilage rights. A person who is a guest is invited into the place of abode and the use of the premises with defined limits as to where he may go and what he may do. A lodger has a sleeping quarters and has limited curtilage rights to use of toilet facilities, the use of hallways and at most the use of a common sitting room. A boarder has these rights and, in addition, would have rights to be present at the dining table and would probably have a greater freedom in the place of abode. But he certainly would not be authorized to use the private facilities of the owner or head of the household whereas a person who is a member of the household would have full rights to be in any part of the place of abode, including lands adjoining, buildings or facilities, basements, pantry, kitchen, without the head of the household or any member of the household feeling that the person had no right to be there. Thus we have a contract involved here of a nature that should be most favored by the law, a personal contract, one which goes to the core of the concept of liberty.

A contract that is not commerce, a contract that by its very nature requires the continuing consent of all parties, a contract which should be favored by government interest because it facilitates the very purpose of government which is the individual pursuit of happiness by its citizens.

THE IMPAIRMENT OF CONTRACT ISSUE

One must first recognize that the effect of this statute is to limit the right to contract to such an extent as to be in effect a total denial of that right. While three or more "blood relatives" could so contract, three or more close friends could not so contract under the ordinance. Thus, we have what amounts to a prohibition on contract, not legislation, which limits by defining one or more of the terms that are a part of the contract. For this reason it appears that the rationale of *Coppage v. Kansas, supra,* and *Adkins v. Children's Hospital,* 261 U.S. 252 may have more application than the cases such as *West Hotel v. Parrish, supra,* and *Holden v. Hardy, supra,* which dealt with limitations upon the terms of the contract. There is no question in Amicus Counsel's mind but that an ordinance, or a statute, which forbid more than two persons acting in concert, from making an employment contract would be declared invalid today and the courts would look to the old so-called anti-labor cases for exactly such authority. While the Court, in deciding *Coppage v. Kansas, supra,* and *Adkins v. Children's Hospital, supra,* failed to recognize the distinction between a prohibition on the right to contract and the defining of the terms of the contract upon the basis of socially responsible action; yet the decisions do give us food for thought in dealing with the effect of the ordinance involved in this case.

This was clearly recognized by Judge Mansfield in his concurring opinion on the denial of the *en banc* hearing. On page 828 (476 F.2d) he says:

> ". . . Here we are not concerned with commercial legislation but with a local ordinance directed squarely against the personal right of individuals to associate and live together and found by the district court to be 'impossible to justify' in terms of 'such familiar zoning objectives as safety, adequate light and air, preservation of lands from overintensive use, avoiding crowding of the population, reduction of traffic congestions and facilitation of adequate transportation, water, sewage, schools, parks and other public services'."

What concerns Amicus in this case is that the ordinance such as the one involved here have the effect of denying to people the right to live with those one chooses by an indirect attack upon the right to contract. Amicus recognizes that by a properly drawn ordinance which is not a prohibition but a definition of some terms of the household agreement may be proper. Indeed the law does just that in many respects such as that involved in the "family car doctrine" such as that involved in the concept of "family expense" and the responsibility therefore. Amicus conceeds that a properly worded zoning ordinance which required a certain area, or certain bedroom space, or even specified a certain number of persons within a dwelling of a specified size might be a proper use of zoning ordinance, but such terms must be of universal application to all citizens not just certain citizens. Amicus also recognizes that a zoning ordinance which established a single-family dwelling could, in a properly drawn ordinance, prohibit a landlord from creating more than one tenancy

in such an area, i.e. prohibit the individual leasing to two, three, four, five or any multiple number of individuals whereby there existed separate tenancy between the landlord and each tenant, because then there is not a "single family" but several households. In such a situation, there is obviously not the same right to contract issue. But that is entirely different from the issue here where the ordinance specifically says "a number of persons but not exceeding two (2) . . . as a single housekeeping unit . . . shall be deemed to constitute a family."

As we have seen, the concept of family has been given a meaning of long standing in the law, and under concepts of zoning it must be defined in terms of household; we have also seen that this involves one of the most personal rights of every citizen and is a contractual relationship; thus, an ordinance such as this must be *necessary* to the achievement of a *compelling* government interest. See Footnote 7, p. 447 in *Eisenstadt v. Baird*, 405 U.S. 438:

> "Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely *rationally* related to a public purpose but *necessary* to the achievement of a *compelling* state interest . . ."

But as we have seen both the district court and the Circuit Court of Appeals have determined that the ordinance provision is not even *rationally* related to a public purpose.

Thus, there is no question but what this court should hold that the plaintiff-appellee's right to contract was impaired by the ordinance, that the ordinance does not con-

stitute a reasonable definition of a term of the contract because of any compelling need for governmental intervention, and that, in fact, it has not even been shown that the ordinance is *ra·tionally* related to a public purpose, but it has been established that it is contrary to a governmental interest because the governmental interest is to favor such contracts as a means of prompting the pursuit of happiness for its citizens.

THE DISCRIMINATORY CLASSIFICATION ISSUE

It is Amicus' position that the ordinance as drawn and as threatened to be applied is discriminatory between citizens in their right to contract in that it establishes a different basis of contract between persons. It is an attempt to create, indirectly as a land-use concept, what is in fact a discriminatory classification between citizens in their right of contract.

The claim by appellants is that the ordinance is to protect the current concept of the "family"; but by its own terms it makes an exception in that it allows *two* unrelated persons to live in a single dwelling unit; but there is no attempt to limit all occupancy to two persons because admittedly persons related by blood in any number can occupy a single dwelling unit. Thus, it cannot logically be argued that the purpose of the zoning ordinance was to limit the number of occupants in a single dwelling unit. Conversely, since the ordinance permits two unrelated persons to live in a single unit it cannot be argued that the ordinance restricts occupancy to husband-wife with or without child or children.

Thus, by the use of zoning laws the Village is seeking to make a distinction between a "marriage contract" which

is a contract to live together, and other types of contracts made by people to associate themselves together. This invades the basic constitutional right of contract and is discriminatory against persons who are not married, thus encountering difficulty with the "equal protection" clause; or conversely, by making a definition of *two* unrelated persons the Village is attempting to make a distinction between a group of persons which is two in number and a group of persons that is three, four, five, or six (or any other number) in number. This invades the basic constitutional rights of contract and is discriminatory as between the number of individuals who wish to contract together. Such discrimination encounters difficulties with the "equal protection" clause. There is a third classification embodied in the ordinance which is the "blood" relationship as contrasted to the term "unrelated". The phrase is "one or more persons related by blood" and the other phrase is a "number of persons but not exceeding two . . . though not related by blood, adoption or marriage, shall be deemed to constitute a family." It would appear clear from this language that any number of brothers and sisters could contract between themselves to live as a household unit and comply with the ordinance. Thus, again the ordinance is not directed to the number of occupants per area, or any other land use concept. The distinction is wholly without any land use basis and is rather directed at an interference with the right of people to establish a common household between themselves (which is of necessity a contractual arrangement) by a classification process which violates the equal protection clause. If a dozen brothers and sisters can constitute a "family" within the ordinance, would this also not then

be true of cousins? second cousins? Cousins to the ninth or tenth degree? Clearly, such persons have a "blood" relationship. If such discriminatory classification is approved, does this not compel the sanctioning of ethnic classification because of the concept of "blood" relationship? No matter how one reads the plain wording of the statute one encounters an attempt to use the zoning ordinance, a land use concept of governmental power, in a discriminatory manner which interfers with a basic constitutional Right of Contract. This is clearly violative of the "equal protection" clause.

To make a distinction between married and unmarried persons did not save a statute from being unconstitutional in *Eisenstadt v. Baird,* 405 U.S. 438. Clearly, under the purposes of the zoning law it is not the marital status of the people involved, but the socially responsible use of land. The zoning law does not deal with "domestic relations", the relationship of one person to another. Its purpose is to deal with the land use. Assuming arguendo that one male and one female each with two adult children were to agree to live together in the Village of Belle Terre under the ordinance in question. We then have six adults living in a single family dwelling. Does it make any difference to a land use ordinance whether any two of these persons have a marriage contract or not? Yet that is exactly the distinction which the ordinance seeks to impose, a distinction which is wholly unrelated to any use of the land. Such contracts between people, regardless of sex, age or background to live together cannot, ipso facto, be considered as suspect or illegal. Rather this involves one of the most personal decisions that every individual has to make for himself or herself. Of all the contracts that an

individual makes with other persons in the course of living, this is one of the most personal and most private. This is an area of great sensitivity to every person. For the law to attempt to define and deny some such contract and approve others is to put the law into the decision of private mores and morals, not on the basis of conduct affecting a governmental interest; the effect could be to align the law with one set of mores and opposed to another. This can become a "governmental interest" only in an authoritarian, one-religiously oriented, government. In this sense, it is a religiously sensitive area, and any claimed right of the exercise of governmental power to discriminate should be suspect.

The law recognizes many commercial contracts, such as contracts for labor, contracts for services, contracts for the sale of one's products, contracts for the purchase of goods, contracts for transportation. In recognizing such contracts the law precludes governmental discrimination which would attempt to say that some persons can enter into such contracts and other persons cannot, without a clear showing that the contract has a direct governmental interest which subjects the contract to regulation.

See: *Allgeyer v. Louisiana, supra, West Coast Hotel v. Parrish, supra, Hardware Dealers Mutual Fire Insurance Co. v. Glidden, supra.*

These generally take the form of business regulations, a specific governmental power granted to both the Federal and State Governments by specific constitutional authorization. There is certainly no specific constitutional authorization to regulate "households" or family grouping, where we have a contract which is strictly a personal agreement about very personal matters. Of all the contracts

which the law recognizes and enforces, the one which deals with the household in which one lives should have a most favored category. Since household contracts are so personal, the area of governmental interest must be very restricted. The agreement to set up a common household should certainly be recognized by the law equally with contracts in other areas of human business and personal dealings, and afforded no greater limitations on their content than commercial contracts, requiring a scrutiny of any law which infringes upon them.

Amicus recognizes that the rental of property is a business and is subject to governmental regulation. Thus, a properly worded and drawn ordinance dealing with the rental of property could set some limitation upon the number of tenancies a landlord could establish based upon the size of a building, or that a certain amount of area had to be provided for each occupant. Similarly the operation of a boarding house, or a lodging house, or a hotel can be regulated. But such regulation should not be construed into a zoning regulation, nor a zoning regulation use as an indirect manner to regulate a business. It is Amicus position that the use of the property here by the Appellees are the same under a zoning ordinance whether the Appellees had purchased the property, owning the fee interest, or whether they had a leasehold tenancy and that what is at issue is a land use. Thus, while a landlord-tenant relationship may involve a business on the part of the landlord and be subject to regulation as such, yet clearly here the ordinance is directed at the Appellees as users of land and not the landlord as a person subject to a regulated business.

Thus, it clearly appears that the ordinance, in creating

a distinction as to two (2) "unrelated" persons is discriminatory classification on its face and in its application to plaintiff-appellee herein, that such discriminatory classification can and will have far-reaching effects in its impairment of the right of contract; is not necessary by reason of any compelling government interest; and is not rationally related to any public interest, but is in fact contrary to a governmental interest in providing for the pursuit of happiness for its citizens.

THE RIGHT OF ASSOCIATION

Amicus also urges upon the Court to recognize that there is a basic Right of Association, a basic right to choose those persons in the society in which we live with whom one associates as friends and partners.

This was recognized in the decision of the Second Circuit in deciding this case, as a sort of additional justification for its decision. See 476 F.2d, p. 817. In a sense this is a right of each person to be discriminatory and it is therefore a limited right. A person cannot open his doors to the public for business and then on this basis discriminate on the basis of certain classifications as to the persons with whom he will do business. Here again we come to the distinction between a governmental regulation of business and a question of personal relationship. The law can say clearly that one cannot refuse to do business with another person because of his origin or social background if one has extended an invitation to the general public to do business with him; but the law cannot say that because one asks a certain "friend" for dinner that therefore, he has to ask all who would like such an invitation. We each have other persons whom

we find compatible and attractive to us, with whom we find stimulation and satisfaction, whose companionship is such that we can share those personal parts of ourselves that we do not show to the general public. This is a basic human necessity which every person has, and one which should be clearly recognized in the law. Where the Right of Association ends and illegal discrimination against persons because of certain circumstances begins is obviously a grey area and incapable of easy definitions. But this is not new or novel in the law: At what point does the merger of business enterprises become illegal restraint on trade? Clearly the merger of business enterprises is not illegal and is assumed to be within the power of the business enterprises, e.g., Minnesota Business Corporation Act, *Minnesota Statutes*, section 301.41, which so provides. Equally clear if the merger results in total monopoly with ability to completely control the prices in a given industry or market it is an illegal act. At some point between the authorization of business enterprises to merge and total price control, the act of merger has become illegal. Similarly, the Right of Association is clear as to an invitation to a friend to dine at one's home and the use of the Right of Association to say one will not do business with another because of his racial background. In one situation we have clearly lawful conduct and in the other clearly unlawful conduct; yet one is but the extension of the other. The extremes are easy to perceive, but the demarcation line is sometimes difficult. Thus, a seeming definition in one case can cause problems in another. It is the grey area which becomes difficult to define.

However, in the case under consideration, we do not have a grey area. Here we have a group of persons who clearly desire the association of each other in the most

personal of all relationships, that of the household unit in which they live. The selection of such associates is a highly personal matter. This is an area which any governmental invasion must be carefully scrutinized. For a governmental structure to say that one must or cannot be a part of the same household with another whether for personal economic reasons (*Marino* case) for religious doctrinaire reasons (Hutterites. Amish and others) for political compatibility, or just plam social agreeability is the type of action which will meet with almost universal opposition. Perhaps the only other attempt at the exercise of government police power which would meet with more universal opposition would be a law determining that one person must reproduce with a certain other person or which person may not reproduce with certain other persons. (This latter has been tried in the miscegenation statutes which have been struck down by the courts and would be clearly held invalid today.) Thus on the facts of this case as the exercise of the Right of Association, we do not have a grey area, but a clear unequivocal invasion of the Right of Association without difficulty of any definition.

Thus, by invading a clear Right of Association and by a discriminatory classification against the Right of Association, the ordinance becomes totally unconstitutional. The arguments and position outlined in pages 24 to 27 of this brief dealing with the impairment of contract are so close that for the sake of brevity, Amicus will include them be reference only herein; similarly the arguments and position outlined in pages 27 to 32 of this brief dealing with the discriminatory issue are so close that Amicus will include them by reference only herein. (This is to save Amicus expense and the Court time, but it is not done

on the basis that the issue is subordinate or unimportant.) Amicus' position is that both the Right of Association and the Right of Contract are independent and substantial individual rights, needing a clarification by the Court.

It is in such a case as this one that the Court has an opportunity to define the Constitutional rights of citizens and thus given societal guidance as to what is permissible governmental action and what is impermissible governmental action and a violation of such basic human rights as are protected by the Ninth Amendment to the Constitution of the United States.

A GOVERNING AUTHORITY

It appears that appellants have argued that the Village of Belle Terre is a small community that has a desire to preserve some concept of homogeneity. If Belle Terre were only a "community" and did not exercise "police power" (to-wit: have the ability to impose fines and incarceration) then perhaps the argument would have some validity, i.e., that if Belle Terre is a community of people with certain beliefs, religious, political or social, and only those sharing the mores of that community were welcome to share the community without governmental power, the argument would have some validity, but Amicus counsel knows of no such concept in our law today. But the Village of Belle Terre claims to be a Municipal corporation, authorized by the State of New York to exercise governmental power, and as a part of the whole "governing structure" in our society. It, therefore, is a governmental body, and rules applicable to its authority are universally applicable to all "governing authority". Thus, the deci-

sion of the Court in this case is going to set out a rule for all governing authorities, unless the Court were to undertake legislative functions and determine that some municipal corporations can adopt such ordinance as that involved in this case and others cannot. The concept of the universality of law is applicable. If the Village of Belle Terre can adopt such an ordinance impairing the Right of Contract and the Right of Association, then any and all governmental authorities have this same power.

Thus, it is imperative that the Court find the ordinance involved invalid and beyond the governmental power, affirming the decision of the Second Circuit Court of Appeals upon the basis presented by plaintiff-appellees or upon one or both of the bases presented by Amicus in this brief.

CONCLUSION

That Article I, §D-1.35a of the Building Zone Ordinance of the Village of Belle Terre (June 8, 1970) is invalid and the decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

VILLAGE OF BELLE TERRE ET AL. *v.* BORAAS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–191. Argued February 19–20, 1974—Decided April 1, 1974

A New York village ordinance restricted land use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly excluding from the term lodging, boarding, fraternity, or multiple-dwelling houses. After the owners of a house in the village, who had leased it to six unrelated college students, were cited for violating the ordinance, this action was brought to have the ordinance declared unconstitutional as violative of equal protection and the rights of association, travel, and privacy. The District Court held the ordinance constitutional, and the Court of Appeals reversed. *Held:*

1. Economic and social legislation with respect to which the legislature has drawn lines in the exercise of its discretion will be upheld if it is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective," *Reed* v. *Reed*, 404 U. S. 71, 76, and here the ordinance—which is not aimed at transients and involves no procedural disparity inflicted on some but not on others or deprivation of any "fundamental" right—meets that constitutional standard and must be upheld as valid land-use legislation addressed to family needs. *Berman* v. *Parker*, 348 U. S. 26. Pp. 7–9.

2. The fact that the named tenant appellees have vacated the house does not moot this case as the challenged ordinance continues to affect the value of the property. Pp. 9–10.

476 F. 2d 806, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post*, p. 10, and MARSHALL, J., *post*, p. 12, filed dissenting opinions.

Bernard E. Gegan argued the cause for appellants. With him on the brief was *James J. von Oiste.*

Lawrence G. Sager argued the cause for appellees. With him on the brief were *Melvin L. Wulf* and *Burt Neuborne.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. It has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Appellees the Dickmans are owners of a house in the village and leased it in December 1971 for a term of 18 months to Michael Truman. Later Bruce Boraas became a colessee. Then Anne Parish moved into the house along with three others. These six are students

at nearby State University at Stony Brook and none is related to the other by blood, adoption, or marriage. When the village served the Dickmans with an "Order to Remedy Violations" of the ordinance,[1] the owners plus three tenants[2] thereupon brought this action under 42 U. S. C. § 1983 for an injunction declaring the ordinance unconstitutional. The District Court held the ordinance constitutional, 367 F. Supp. 136, and the Court of Appeals reversed, one judge dissenting, 476 F. 2d 806. The case is here by appeal, 28 U. S. C. § 1254 (2); and we noted probable jurisdiction, 414 U. S. 907.

This case brings to this Court a different phase of local zoning regulations than we have previously reviewed. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, involved a zoning ordinance classifying land use in a given area into six categories. Appellees' tracts fell under three classifications: U–2, which included two-family dwellings; U–3, which included apartments, hotels, churches, schools, private clubs, hospitals, city hall and the like; and U–6, which included sewage disposal plants, incinerators, scrap storage, cemeteries, oil and gas storage and so on. Heights of buildings were prescribed for each zone; also, the size of land areas required for each kind of use was specified. The land in litigation was vacant and being held for industrial development; and evidence was introduced showing that under the restricted-use

[1] *Younger* v. *Harris*, 401 U. S. 37, is not involved here, as on August 2, 1972, when this federal suit was initiated, no state case had been started. The effect of the "Order to Remedy Violations" was to subject the occupants to liability commencing August 3, 1972. During the litigation the lease expired and it was extended. Anne Parish moved out. Thereafter the other five students left and the owners now hold the home out for sale or rent, including to student groups.

[2] Truman, Boraas, and Parish became appellees but not the other three.

ordinance the land would be greatly reduced in value. The claim was that the landowner was being deprived of liberty and property without due process within the meaning of the Fourteenth Amendment.

The Court sustained the zoning ordinance under the police power of the State, saying that the line "which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Id.*, at 387. And the Court added: "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.*, at 388. The Court listed as considerations bearing on the constitutionality of zoning ordinances the danger of fire or collapse of buildings, the evils of overcrowding people, and the possibility that "offensive trades, industries, and structures" might "create nuisance" to residential sections. *Ibid.* But even those historic police power problems need not loom large or actually be existent in a given case. For the exclusion of "all industrial establishments" does not mean that "only offensive or dangerous industries will be excluded." *Ibid.* That fact does not invalidate the ordinance; the Court held:

> "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Id.*, at 388–389.

The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; the hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." *Id.*, at 394. The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. *Id.*, at 388.

Our decision in *Berman* v. *Parker*, 348 U. S. 26, sustained a land-use project in the District of Columbia against a landowner's claim that the taking violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. The essence of the argument against the law was, while taking property for ridding an area of slums was permissible, taking it "merely to develop a better balanced, more attractive community" was not, *id.*, at 31. We refused to limit the concept of public welfare that may be enhanced by zoning regulations.[3] We said:

"Miserable and disreputable housing conditions may do more than spread disease and crime and immo-

[3] Vermont has enacted comprehensive statewide land-use controls which direct local boards to develop plans ordering the uses of local land, *inter alia*, to "create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, [and] reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population . . ." Vt. Stat. Ann., Tit. 10, § 6042 (1973). Federal legislation has been proposed designed to assist States and localities in developing such broad objective land-use guidelines. See Senate Committee on Interior and Insular Affairs, Land Use Policy and Planning Assistance Act, S. Rep. No. 93-197 (1973).

rality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.*, at 32–33.

If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of *Buchanan* v. *Warley*, 245 U. S. 60, where the Court invalidated a city ordinance barring a black from acquiring real property in a white residential area by reason of an 1866 Act of Congress, 14 Stat. 27, now 42 U. S. C. § 1982, and an 1870 Act, § 17, 16 Stat. 144, 42 U. S. C. § 1981, both enforcing the Fourteenth Amendment. *Id.*, at 78–82. See *Jones* v. *Mayer Co.*, 392 U. S. 409.

In *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, Seattle had a zoning ordinance that permitted a " 'philanthropic home for children or for old people' " in a particular district " 'when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.' " *Id.*, at 118. The Court held that provision of the ordinance unconstitutional, saying that the existing owners could "withhold consent for selfish reasons or arbitrarily and

may subject the trustee [owner] to their will or caprice." *Id.*, at 122. Unlike the billboard cases (*e. g., Cusack Co. v. City of Chicago*, 242 U. S. 526), the Court concluded that the Seattle ordinance was invalid since the proposed home for the aged poor was not shown by its maintenance and construction "to work any injury, inconvenience or annoyance to the community, the district or any person." 278 U. S., at 122.

The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society.[4]

We find none of these reasons in the record before us. It is not aimed at transients. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin* v. *Illinois*, 351 U. S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, *Harper* v. *Virginia Board*, 383 U. S. 663; the right of association, *NAACP* v. *Alabama*, 357 U. S. 449; the right of access to the courts, *NAACP* v. *Button*, 371 U. S. 415; or any rights of privacy, cf. *Griswold* v. *Connect-*

[4] Many references in the development of this thesis are made to F. Turner, The Frontier in American History (1920), with emphasis on his theory that "democracy [is] born of free land." *Id.*, at 32.

icut, 381 U. S. 479; *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be " 'reasonable, not arbitrary' " (quoting *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed*, 404 U. S. 71, 76.

It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included.[5] That exercise of discretion, however, is a legislative, not a judicial, function.

It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together.[6] There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.

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[5] Mr. Justice Holmes made the point a half century ago.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (dissenting opinion).

[6] *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), is therefore inapt as there a household containing anyone unrelated to the rest was denied food stamps.

The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman* v. *Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The suggestion that the case may be moot need not detain us. A zoning ordinance usually has an impact on the value of the property which it regulates. But in spite of the fact that the precise impact of the ordinance sustained in *Euclid* on a given piece of property was not known, 272 U. S., at 397, the Court, considering the matter a controversy in the realm of city planning, sustained the ordinance. Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their place; it is obvious that the scale of rental values rides on what we decide today. When *Berman* reached us it was not certain whether an entire tract would be taken or only the buildings on it and a scenic easement. 348 U. S., at 36. But that did not make the case any the less a controversy in the constitutional sense. When Mr. Justice Holmes said for the Court in *Block* v. *Hirsh*, 256 U. S. 135, 155, "property rights may be cut down, and to that extent taken, with-

out pay," he stated the issue here. As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known.

Reversed.

MR. JUSTICE BRENNAN, dissenting.

The constitutional challenge to the village ordinance is premised *solely* on alleged infringement of associational and other constitutional rights of *tenants*. But the named tenant appellees have quit the house, thus raising a serious question whether there now exists a cognizable "case or controversy" that satisfies that indispensable requisite of Art. III of the Constitution. Existence of a case or controversy must of course appear at every stage of review, see, *e. g., Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *Steffel* v. *Thompson*, 415 U. S. 452, 459 n. 10 (1974). In my view it does not appear at this stage of this case.

Plainly there is no case or controversy as to the named tenant appellees since, having moved out, they no longer have an interest, associational, economic or otherwise, to be vindicated by invalidation of the ordinance. Whether there is a cognizable case or controversy must therefore turn on whether the lessor appellees may attack the ordinance on the basis of the constitutional rights of their tenants.

The general "weighty" rule of practice is "that a litigant may only assert his own constitutional rights or immunities," *United States* v. *Raines*, 362 U. S. 17, 22 (1960). A pertinent exception however ordinarily limits a litigant to the assertion of the alleged denial of another's constitutional rights to situations in which there is: (1) evidence that as a direct consequence of the denial of constitutional rights of the others, the litigant faces substantial economic injury, *Pierce* v. *Society of*

Sisters, 268 U. S. 510, 535–536 (1925); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953), or criminal prosecution, *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), and (2) a showing that the litigant's and the others' interests intertwine and unless the litigant may assert the constitutional rights of the others, those rights cannot effectively be vindicated. *Griswold* v. *Connecticut*, *supra*; *Eisenstadt* v. *Baird*, *supra*; see also *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

In my view, lessor appellees do not, on the present record, satisfy either requirement of the exception. Their own brief negates any claim that they face economic loss. The brief states that "there is nothing in the record to support the contention that in a middle class, suburban residential community like Belle Terre, traditional families are willing to pay more or less than students with limited means like the Appellees." Brief for Appellees 54–55. And whether they face criminal prosecution for violations of the ordinance is at least unclear. The criminal summons served on them on July 19, 1972, was withdrawn because not preceded, as required by the Village's procedure, by an order requiring discontinuance of violations within 48 hours. An order to discontinue violation was served thereafter on July 31, but was not followed by service of a criminal summons when the violation was not discontinued within 48 hours.*

The Court argues that, because a zoning ordinance "has an impact on the value of the property which it regulates," there is a cognizable case or controversy. But

*In these circumstances, I agree with the Court that no criminal action was "pending" when this suit was brought and that therefore the District Court correctly declined to apply the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971).

even if lessor appellees for that reason have a personal stake, and we were to concede that landlord and tenant interests intertwine in respect of the ordinance, I cannot see, on the present record, how it can be concluded that "it would be difficult if not impossible," *Barrows* v. *Jackson*, *supra*, at 257, for present or prospective unrelated tenant groups of more than two to assert their own rights before the courts, since the departed tenant appellees had no difficulty in doing so. Thus, the second requirement of the exception would not presently appear to be satisfied. Accordingly it is irrelevant that the house was let, as we are now informed, to other unrelated tenants on a month-to-month basis after the tenant appellees moved out. None of the new tenants has sought to intervene in this suit. Indeed, for all that appears, they too may have moved out and the house may be vacant.

I dissent and would vacate the judgment of the Court of Appeals and remand to the District Court for further proceedings. If the District Court determines that a cognizable case or controversy no longer exists, the complaint should be dismissed. *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

MR. JUSTICE MARSHALL, dissenting.

This case draws into question the constitutionality of a zoning ordinance of the incorporated village of Belle Terre, New York, which prohibits groups of more than two unrelated persons, as distinguished from groups consisting of any number of persons related by blood, adoption or marriage, from occupying a residence within the confines of the township.[1] Lessor-appellees, the two owners of a Belle Terre residence, and three unrelated student tenants challenged the ordinance on the ground that it establishes a classification between households of

[1] The text of the ordinance is reprinted in part, *ante*, at 2.

related and unrelated individuals, which deprives them of equal protection of the laws. In my view, the disputed classification burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments. Because the application of strict equal protection scrutiny is therefore required, I am at odds with my Brethren's conclusion that the ordinance may be sustained on a showing that it bears a rational relationship to the accomplishment of legitimate governmental objectives.

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.

I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly

confined. See *Berman* v. *Parker*, 348 U. S. 26 (1954). And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights.

When separate but equal was still accepted constitutional dogma, this Court struck down a racially restrictive zoning ordinance. *Buchanan* v. *Warley*, 245 U. S. 60 (1917). I am sure the Court would not be hesitant to invalidate that ordinance today. The lower federal courts have considered procedural aspects of zoning,[2] and acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities.[3] These are limited but necessary intrusions on the discretion of zoning authorities. By the same token, I think it clear that the First Amendment provides some limitation on zoning laws. It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs. Zoning officials properly con-

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[2] See *Citizens Assn. of Georgetown* v. *Zoning Comm'n*, 155 U. S. App. D. C. 233, 477 F. 2d 402 (1973).

[3] See *Kennedy Park Homes Assn.* v. *Lackawanna*, 436 F. 2d 108 (CA2 1970); *Dailey* v. *City of Lawton*, 425 F. 2d 1037 (CA10 1970); cf. *Gautreaux* v. *City of Chicago*, 480 F. 2d 210 (CA7 1973); *Crow* v. *Brown*, 457 F. 2d 788 (CA5 1972); *Southern Alameda Spanish Speaking Organization* v. *Union City*, 424 F. 2d 291 (CA9 1970). See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969); Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971); Note, The Responsibility of Local Zoning Authorities to Nonresident Indigents, 23 Stan. L. Rev. 774 (1971).

cern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.

My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. *Id.*, at 430–431; *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1 (1964). See *United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576 (1971); *Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967). The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.

The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to "establish a home" is an essential part of the liberty guaranteed by the Fourteenth Amendment. *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923); *Griswold* v. *Connecticut*, 381 U. S. 479, 495 (1965) (Goldberg, J., concurring). And the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of his own home." *Stan-*

ley v. *Georgia*, 394 U. S. 557, 565 (1969); see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 66–67 (1973). Constitutionally protected privacy is, in Mr. Justice Brandeis' words, "as against the Government, the right to be let alone . . . the right most valued by civilized man." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (dissenting opinion). The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates or others— involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution. See *Roe* v. *Wade*, 410 U. S. 113, 153 (1973); *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Stanley* v. *Georgia*, *supra*, at 564–565; *Griswold* v. *Connecticut*, *supra*, at 483, 486; *Olmstead* v. *United States*, *supra*, at 478 (Brandeis, J., dissenting); *Moreno* v. *Department of Agriculture*, 345 F. Supp. 310, 315 (DC 1972), aff'd, 413 U. S. 528 (1973).

The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community.[4] The town has, in

[4] "Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apart-

effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[5]

This is not a case where the Court is being asked to nullify a township's sincere efforts to maintain its residential character by preventing the operation of rooming houses, fraternity houses, or other commercial or high-density residental uses. Unquestionably, a town is free to restrict such uses. Moreover, as a general proposition, I see no constitutional infirmity in a town limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria.[6] This ordinance, however, limits the density of occupancy of only those homes occupied by unrelated persons. It thus reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.

It is no answer to say, as does the majority, that associational interests are not infringed because Belle Terre residents may entertain whomever they choose. Only last Term MR. JUSTICE DOUGLAS indicated in concurrence that he saw the right of association protected by the First Amendment as involving far more than the right to entertain visitors. He found that right infringed by a restriction on food stamp assistance, penalizing

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ments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." *Appeal of Girsh*, 437 Pa. 237, 245 n. 4, 263 A. 2d 395, 399 n. 4 (1970).

[5] See generally Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N. Y. U. L. Rev. 670, 740–750 (1973).

[6] See *Palo Alto Tenants' Union* v. *Morgan*, 487 F. 2d 883 (CA9 1973).

households of "unrelated persons." As MR. JUSTICE DOUGLAS there said, freedom of association encompasses the "right to invite the stranger into one's home" not only for "entertainment" but to join the household as well. *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 538–545 (1973) (concurring opinion). I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights.

Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest, *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969). And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958).

A variety of justifications have been proffered in support of the village's ordinance. It is claimed that the ordinance controls population density, prevents noise, traffic and parking problems, and preserves the rent structure of the community and its attractiveness to families. As I noted earlier, these are all legitimate and substantial interests of government. But I think it clear that the means chosen to accomplish these purposes are both overinclusive and underinclusive, and that the asserted goals could be as effectively achieved by means of an ordinance that did not discriminate on the basis of constitutionally protected choices of lifestyle. The ordinance imposes no restriction whatsoever on the number

of persons who may live in a house, as long as they are related by marital or sanguinary bonds—presumably no matter how distant their relationship. Nor does the ordinance restrict the number of income earners who may contribute to rent in such a household, or the number of automobiles that may be maintained by its occupants. In that sense the ordinance is underinclusive. On the other hand, the statute restricts the number of unrelated persons who may live in a home to no more than two. It would therefore prevent three unrelated people from occupying a dwelling even if among them they had but one income and no vehicles. While an extended family of a dozen or more might live in a small bungalow, three elderly and retired persons could not occupy the large manor house next door. Thus the statute is also grossly overinclusive to accomplish its intended purposes.

There are some 220 residences in Belle Terre occupied by about 700 persons. The density is therefore just above three per household. The village is justifiably concerned with density of population and the related problems of noise, traffic, and the like. It could deal with those problems by limiting each household to a specified number of adults, two or three perhaps, without limitation on the number of dependent children.[7] The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the township than the ordinance before us today, for it would more realistically

[7] By providing an exception for dependent children, the township would avoid any doubts that might otherwise be posed by the constitutional protection afforded the choice of whether to bear a child. See *Molino* v. *Mayor & Council of Glassboro*, 116 N. J. Super. 195, 281 A. 2d 401 (1971); cf. *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974).

restrict population density and growth and their attendant environmental costs. Various other statutory mechanisms also suggest themselves as solutions to Belle Terre's problems—rent control, limits on the number of vehicles per household, and so forth, but, of course, such schemes are matters of legislative judgment and not for this Court. Appellants also refer to the necessity of maintaining the family character of the village. There is not a shred of evidence in the record indicating that if Belle Terre permitted a limited number of unrelated persons to live together, the residential, familial character of the community would be fundamentally affected.

By limiting unrelated households to two persons while placing no limitation on households of related individuals, the village has embarked upon its commendable course in a constitutionally faulty vessel. Cf. *Marshall* v. *United States*, 414 U. S. 417, 430 (1974) (dissenting opinion). I would find the challenged ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the town to continue to pursue those purposes but by means of more carefully drawn and even-handed legislation.

I respectfully dissent.